THE JUDICIAL SYSTEM

IIPA Silver Jubilee Lectures

THE JUDICIAL SYSTEM

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FOREWORD

As part of its Silver Jubilee celebrations, the IIPA invited Mr. Justice H.R. Khanna to deliver a series of lectures on the The Judicial System. Mr. Justice Khanna delivered the lectures in the IIPA auditorium on December 3, 4 and 5, 1979 before a distinguished audience.

On the three days, the function was presided over by three learned and distinguished persons : Shri M. Hidayatullah, Vice-President of India and President of the IIPA, inaugurated the lectures and presided over the first day's function. Dr. Nagendra Singh, Judge, the International Court of Justice, The Hague, took the chair on the second day. Mr. Justice A.N. Grover, Chairman, Press Council of India, presided over the third day's function.

The lectures and the chairmen's remarks are being published now for a wider dissemination in the hope that the students of public administration, law, and others interested in the subject will find them useful.

T.N. Chaturvedi

(T.N. CHATURVEDI)
Director

IIPA, New Delhi
March 1980

CONTENTS

1ST DAY

HISTORICAL BACKGROUND

Welcome
Introductory Remarks
Historical Background
Concluding Remarks
Vote of Thanks

WELCOME

T.N. CHATURVEDI

I extend to you all a very warm welcome this evening on behalf of the Indian Institute of Public Administration. We are indeed privileged to have with us Shri Mohammad Hidayatullah, our Vice-President and the President of the Indian Institute of Public Administration, to inaugurate and preside over the first in the series of three IIPA Silver Jubilee lectures on the Judicial System that Mr. Justice H.R. Khanna has so very kindly agreed to deliver. As you are all aware, the second and third lectures in the series will be delivered tomorrow and the day after.

The Indian Institute of Public Administration is engaged in the task of training, research, consultancy, publications, library services and extension in the field of public administration. The Institute has all along kept a policy perspective in administration and development and the significance of many of its research studies has been widely acclaimed. The Institute has over 250 books/monographs to its credit. The Institute has helped many State Governments and the many committees and commissions set up from time to time by the Central and State Governments through research, commissioned work and other allied programmes. The Indian Journal of Public Administration enjoys a wide circulation both in this country and abroad. Its Special Numbers have won appreciation from all concerned. This year's Special Number on Administration for Child Welfare has brought the Institute considerable credit. You may be interested to know that we propose the current issue (Oct.-Dec. 1979) to be a Special Number on Secrecy in Government. The Institute provides a forum to the practising administrators, experts and academicians as well as the enlightened citizens who take interest in the problems of good government. The Institute is particularly gratified that it has helped in promoting public administration as an academic discipline in this

country, apart from contributing to the advancement of the frontiers of administration and management in many diverse ways.

We have already a Centre for Urban Studies and the quarterly journal which the Centre has been publishing contains articles on professional and practical interests in the expanding area of local government and urban problems. We have also started a Centre for Rural Development so that we can view the problems of administrative management in the country in a more purposive and integrated manner.

The Silver Jubilee year has provided us an opportunity to look back and plan for the future so that the Institute can serve its objectives more effectively in the years to come. A variety of programmes and publications has been planned as part of the Silver Jubilee year.

We welcome you, Mr. Vice-President, as this is your first visit to the premises of the Institute after having graciously consented to become the President of the Institute. Your association with the Institute during the coming years will act as a source of encouragement, inspiration and strength to us.

It may not be necessary to introduce you, sir, to this knowledgeable and distinguished audience. Probably it is also not possible to give a full introduction of an active and eminent person like you within the next few minutes, nor does it seem necessary.

Shri Hidayatullah, after having a distinguished academic career at Morris College, Nagpur, Trinity College, Cambridge, and at Lincoln's Inn, London, practised at the Nagpur High Court till 1946 when he was appointed Advocate General of the then Madhya Pradesh. Having served as a Judge of the Nagpur High Court, he was Chief Justice of the Nagpur High Court and subsequently of the Madhya Pradesh High Court. In 1968, Shri Hidayatullah was elevated as a Judge, Supreme Court of India, and he served as the Chief Justice of India from 1968 to 1970. In 1969, at a very critical time of our national history, he acted as the President of India. Shri Hidayatullah has all along been interested in the promotion and development of law and legal education in the country. He has been awarded honorary doctorates by a number of universities and institutions in this country and abroad in

recognition of his scholarship and eminence in the world of law. He was President of the Indian Law Institute, the International Law Association and the Indian Society of International Law. He is a member of the International Institute of Space Law, Paris, and several other social and cultural organisations and institutions. He has been invited to deliver a number of memorial lectures, including the well-known Tagore Law Lectures.

He has been associated very closely with the boy scouts movement. A man of versatile interests, he is the author of a number of publications and, if I do not betray a secret, his memoirs of a long and distinguished career in public service may be published very shortly. May I, sir, Mr. Vice-President, extend to you once more a very cordial welcome.

We are also beholden to this evening's distinguished speaker, Mr. Justice H.R. Khanna who has been gracious enough to spare his valuable time to give this series of lectures and I welcome him on your behalf, on behalf of the IIPA and on my own behalf. Mr. Justice Khanna received his education at Amritsar and Lahore. He was greatly influenced by his father Mr. Sarbdayal Khanna, himself a lawyer of great repute who commanded great respect in his own time for his socio-political activities. Mr. Justice Khanna practised as an advocate at Amritsar till July 1952. As District & Sessions Judge, he was the 'Commission of Inquiry' to enquire into the police firing at Kalka in 1956. As a Special Judge, he tried Shri R.K. Dalmia and others. He was Judge of the Punjab & Delhi High Courts. In 1968, he was appointed as the one man enquiry commission against some former ministers of Orissa. He was the Chief Justice of the Delhi High Court from 1969 to 1971, when he was elevated as a Judge of the Supreme Court. He resigned from the Supreme Court in March, 1977. He has also been the Chairman of the Law Commission.

Mr. Justice Khanna has been known for his social sensitivity, human values and for his belief in the dignity of the citizen. The Bar Association of India did him a signal honour by presenting his portrait to the Supreme Court in December, 1978, and the portrait was unveiled by the present Chief Justice.

We are exceedingly grateful to you, sir, for having agreed to deliver these lectures on a subject of interest to all fellow citizens. We keenly look forward to hear you.

Ladies and Gentlemen, once again I welcome you all. May I request you, sir, Mr. Vice-President, to inaugurate the Silver Jubilee lecture series.

INTRODUCTORY REMARKS

M. HIDAYATULLAH

I must first of all thank the Indian Institute of Public Administration for having invited me to become the President of this Institute. I readily agreed because it is one of the most prestigious institutes in India.

I do not think I would say much at this stage in the inauguration of this series except that it is good that the Institute has started the series with Justice Khanna who will explain the law with his wide learning and knowledge and will open the door for further discussions on other aspects of our social, political and judicial life.

I am sorry that for reasons beyond my control I was late in attending this function, for which you have my apologies.

I will now say whatever I have to say at the end because I find that I have to make some concluding remarks also, and at that time I should be able to express my thoughts on this subject.

May I now request Justice Khanna to deliver his lecture.

HISTORICAL BACKGROUND

H. R. KHANNA

I deem it a great privilege to have been asked to deliver this series of lectures on the judical system in the Indian Institute of Public Administration as a part of its Silver Jubilee celebrations.

The Institute seeks to impart training and create an awareness for improvement in policies and performance in administrators, in the various ministries and departments of the Central and State Governments as well as the public sector. The Institute aims to fulfil its objectives of introducing the latest ideas, managerial techniques and perspectives in administration through training, research, consultancy, extension, library services and publications. The Indian Journal of Public Administration has a place of its own in the world of administration in India and abroad. I am also glad to know that the Institute has a Centre for Urban Studies and that it is also going to have this year a Centre for Rural Development, thus endeavouring to bring about improvement in the totality of the administrative system in the country.

The process of education continues throughout one's life and it must be rewarding and fruitful after many years in the rough and tumble of active life of an administrator to spend some time in the quiet and academic atmosphere of the Institute and indulge in a bit of reflection and introspection. At a time when public life is swayed by politicians rather than policies, their doings and antics rather than major issues of national policy, their internecine strifes and manoeuvres rather than a calm and dispassionate study of questions affecting the national weal, it must be a welcome escape to come to the Institute and exchange views with fellow officers from different parts of the country.

Role of the Civil Service

Civil services, there can be no doubt, provide the framework of the administration of the country. The ministers take the policy decisions. In arriving at these decisions and looking to their consequences, they may, if they choose, seek the advice of the civil servants, but the ultimate decision has necessarily to be that of the ministers. It is, however, in the field of implementation of those decisions that the role of administrators and other civil servants has great significance. The civil servants also provide continuity to the administration. They are the constant factor in the administration unlike the political bosses who can and do change as a result of shifts in political scenes and quick-sands of party manoeuvring. It is essential that the civil services should project an image of quiet efficiency and not get caught in the wranglings of political parties, groups or individuals. The nation has a vital interest in preserving the image of its civil servants, for on their efficiency, integrity, ability and dedication depends the actual working of the government. It is also they who provide the wheels of the administration. A feeling of confidence in the civil servants is one of the essentials for drawing the optimum out of them. It has, therefore, to be ensured that the general confidence in the civil servants is not impaired. We must not forget that it is the civil service which maintains the government as a going concern. The civil service corrects the risk involved in decisions taken under pressure of popular feelings by off-setting and balancing such pressure with a medium where expertise and ascertainable knowledge are the protective envelop of action. It oils the machinery of politics by relating the popular will, as the party in power reflects the impact of the popular will, to what a detached and disinterested experience believes to be practicable. Its authority is that of influence, not that of power. It indicates consequences but it does not impose commands.

In recent years the quality of initiative, independence of approach and free and frank discussion, which should be the hallmark of civil services, has been at a discount and has suffered erosion because of the sustained assaults which have been made by various political bosses against any tendency to

show such qualities. This has been so both at the Centre and in the States, though the symptom has been much more acute in the States. Officers who show independence are put on unimportant assignments where they can hardly show their worth and capacity, while those who are prepared to exhibit undue subservience and are prone to subdue and hypothecate their faculties to the wishes of the political bosses get all the favours and often out of turn promotions. It would be idle to pretend in such situations that the morale of civil servants would remain unaffected and that they would still retain the elan which was previously associated with them. The nation has a right to have the optimum out of its civil servants. It is essential that nothing should be done as might impinge upon this objective.

Administration of justice is one of the most essential functions of the state. If men were gods and angels, no law courts would perhaps be necessary though even then the sceptics might refer to the quarrels among gods, particularly in the context of goddesses. As it is, we find that though man may be a little lower than the angels, he has not yet shed off the brute. Not far beneath within the man, there lurks the brute and the brute is apt to break loose on occasions. To curb and control that brute and to prevent degeneration of society into a state of tooth and claw, we need the rule of law. We also need the rule of law for punishing all deviations and lapses from the code of conduct and standard of behaviour which the community speaking through its representatives has prescribed as the law of the land. Being human, disputes are bound to arise amongst us. For the settlement of those disputes, we need guidelines in the form of laws and forums to redress the wrongs in the form of courts. Laws and courts have always gone together. There is a close nexus between them, neither courts can exist without the laws nor laws without the courts. The judicial system deals with the administration of the laws through the agency of the courts. The system provides the machinery for the resolving of the disputes on account of which the aggrieved party approaches the courts. Nothing rankles in human heart more than a brooding sense of injustice. No society can allow a situation to grow where the impression prevails of there being no redress for grievances.

A state consists of three organs, the legislature, the executive and the judiciary. The judiciary, it has been said, is the weakest of the three organs. It has neither the power of the purse nor the power of the sword, neither money nor patronage, not even the physical force to enforce its decisions. Despite that, the courts have by and large enjoyed high prestige amongst and commanded respect of the people. This is so because of the moral authority of the courts and the confidence the people have in the role of the courts to do justice between the rich and the poor, the mighty and the weak, the state and the citizen, without fear or favour.

The present judicial system of India was not a sudden creation. It has been evolved as the result of slow and gradual process and bears the imprint of the different periods of India's history. The periods which, however, have made the greatest impact on the existing system are those nearest to the present times and it is not surprising that the period preceding and following the dawn of independence, more particularly the one after the coming into force of the constitution, have been the greatest moulding factors.

Judicial System in Ancient India

History of our judicial system takes us to the hoary past when Manu and Brihaspati gave us *Dharam Shastras*, Narada the *Smritis*, and Kautilya the *Arthshastra*. A study of these memorable books would reveal that we in ancient India had a fairly well-developed and sophisticated system of administration of justice. In broad outlines there is considerable similarity between the system then in vogue and the system now in force. A civil judicial proceeding in ancient India as at present commenced ordinarily with the filing of a plaint or what was known as *Purva Paksha* before a competent authority. A plaint, it was required, must be brief in words, unambiguous and free from confusion. In case of disputes about property, elaborate rules laid down the requirement about giving detailed and full description of the property. Written statements known as *Uttara Paksha* were required to be filed by the defendants and the rules enjoined that they must not be vague and must meet all the points of the plaint. Normally, parties were required to produce their witnesses. The presence

of the witnesses who were far away or would not stir out was secured by the orders of the judge. Different modes of proof for substantiating allegations were prescribed. On the conclusion of the trial, judgement known as *Nirnaya* was pronounced and the successful party became entitled to *Jayapatra* or a document of success. Execution of the decrees could entail imprisonment, sale, fine and demand for additional security. The doctrine of *res judicata* known as *Pran Nyaya* was well-known.

In criminal law there was an elaborate classification of offences. Apart from offences like rape, dacoity and the like (which may be called conventional offences), there were other offences like not running to the rescue of another person in distress. Punishment was prescribed for causing damage to trees in city parks, to trees providing shades, to trees bearing flowers and fruits and to trees in holy places. It was an offence for a judge to give a wrong decision out of corrupt motive. Perjury by a witness attracted severe penalty. There were six types of punishment, namely, fine, reprimand, torture, imprisonment, death and banishment.

Theft was classified into three kinds according to the value of the thing stolen. There was also a classification of thieves. Some were considered open or patent thieves and others secret thieves. Open or patent thieves included traders who employed false weights and measures, gamblers, quacks and persons who manufactured counterfeit articles. Secret thieves were those who moved about clandestinely.

Adultery, according to *Shastras*, consisted of three categories. Flirting about with another man's wife, dallying with her clothes or sending her a pimp, being with her in an unfrequented place, or bathing in her company in the same pool or holding conversation with her, with winks, gallantries and smiles passing on both sides, or at any improper time constituted one of the species of adultery and was punishable ordinarily with small fines only. Sending a woman sandalwood, a string of beads, drinks, clothes or gold or jewels was another species of adultery punishable with larger fines. Sleeping together or dallying upon the same carpet or kissing, caressing, or embracing a woman or carrying her into a retired place with her tacit consent was the third and worst species of adultery, punishable with still larger fines. A mediator or go-

between could also be punished with fines; and the woman was not considered exempt from punishment.

Manu prescribed the following oath for parties and witnesses : "Let the Judge cause a Brahmin to swear by his truth or *sat*, a Kshatriya by his chariot or the animal he rides or by his weapons, a Vaishya by his cattle, grain and gold, and a Shudra by imprecating on his head the guilt of all grievous offences." If the idea of oath, according to Bentham, is to have a ceremony composed of words and gestures by which the Almighty is engaged eventually to inflict on the taker of the oath punishment in quantity and quality—in the event of his doing something which he engages not to do or omitting to do something which he in like manner engages to do—the oath administered in ancient India was perhaps more effective compared to the present lifeless recital of a formula about swearing to speak the truth.

The Tughlaq period saw the compilation of the code of civil procedure. It was called *Fiqha-e-Feroze Shahi*. The code prescribed details of the procedure and the law in several matters. It was written in Arabic and was translated into Persian under the orders of Feroz Shah Tughlaq. The procedure laid down in this book was followed till the reign of Aurangzeb when it was replaced by *Fatawa-i-Alamgiri* written in 1670. According to *Fatawa-i-Alamgiri*, the *Qazi* first prayed and craved God's help in the administration of justice. He was assisted by *Katib*. The *Qazi* was obliged to see that the evidence was correctly recorded. The plaintiff was called the *Muddai* and the defendant was called *Muddaa Allaih*. The plaint was called *Daawa* while the complaint in criminal cases was called *Istaghasa*. A party could have an agent as vakil or an attorney to represent his case.

The system of administration of justice and laws as we have today is the product of well thought out efforts on the part of the then British Government. No less than four law commissions and other committees were appointed during the years 1834 to 1947 to give shape to the system.

In the matter of succession and other allied matters, the parties were left to be governed by the personal law. Although the impact of the English common law was perceptible in the codified law of India, departure from the common law was

also made whenever it was considered necessary to meet the local needs. In answer to the criticism that the present judicial system is unsuited to the Indian conditions and something alien transplanted on the Indian soil, it may be observed, as stated by the Law Commission, that though some of the changes in the early period of British rule in India were influenced by the system prevailing in England in those days, the changes did not have the effect of ousting the personal laws. No judicial system in any country is wholly immune from, and unaffected by, outside influences, nor can such outside influence be always looked upon as a bane. The laws of a country do not reside in a sealed book; they grow and develop. The winds of change, and the free flow of ideas, do not pass the law idly by. As has been observed in a report, even in procedural law, which was codified by the foreign rulers in this country, the basic principles of a fair and impartial trial, which were well-known to their predecessors, were adhered to. In the matter of substantive law as well, the British did not wholly bring in the Western concepts. The personal law of the various communities living in this country remained the determining factor in questions like succession, inheritance, marriage, caste, religious institutions, etc. New laws were enacted to provide for matters which were either not fully covered by the indigenous law, or where such laws were not clearly defined and ascertainable, or were otherwise not acceptable to the modern way of thinking. Such outside influences are, however, an integral part of the historical process of development of thought and institutions all over the world, and once the new concepts get assimilated, they cease to be alien in character. Viewed in this light, it seems hardly correct to say that the present judicial system is a foreign transplant on Indian soil, or that it is based on alien concepts unintelligible to our people. The people have become fully accustomed to this system during more than a hundred years of its existence. The procedures and even the technical terms used by the lawyers and the judges are widely understood by the large majority of litigants.

The judicial system in essence pertains to the courts and the judges, their hierarchy and mode of functioning. By its very nature, it is inextricably connected with the rule of law. It tells us as to how justice is administered in the land where it is in force.

Coming to the hierarchy of courts, we find that there are courts at different levels—the trial courts, the courts of appeal and sometimes the courts of second appeal. Even amongst the trial courts, there are different categories. Some cases are dealt with by the munsiffs in some States and by subordinate judges of second or third-class in other States. Suits of higher value are dealt with by subordinate judges or subordinate judges of first class. In some States subordinate judges exercise unlimited jurisdiction in civil suits, while in other States suits of higher valuation are dealt with by district judges or city civil court judges. In certain metropolitan cities, original jurisdiction for trial of suits beyond particular value is vested in the High Court. Apart from the above, jurisdiction is vested in the court of small causes for trial of certain types of cases in which the pecuniary claim is not very high. On the criminal side, most of the cases are tried by the courts of magistrates. Cases involving serious crimes and attracting severer punishment are dealt with by the court of sessions.

Importance of the Trial Court

Many of us may not be aware of the importance of the trial court judges and therefore it would be pertinent to stress the vital role of the trial court. To repeat what I said on an earlier occasion, if an evaluation were made of the importance of the role of the different functionaries who play their part in the administration of justice, the top position would necessarily have to be assigned to the trial court judge. He is the key man in our judicial system, the most important and influential participant in the dispensation of justice. It is mostly with the trial judge rather than with the appellate judge that the members of the general public come in contact, whether as parties or as witnesses. The image of the judiciary for the common man is projected by the trial court judges and this, in turn, depends upon their intellectual, moral and personal qualities.

There has, of late, been a manifold increase in the number of civil and criminal cases and this increase has subjected the trial judges to extreme strains. The problems faced by the trial courts call for great qualities of head and heart.

Another misconception which also needs to be removed is that as ours is a government of laws and not of men, the per-

sonality of the trial judge makes no difference. Most of us who are familiar with the functioning of the courts would bear out that the above notion is divorced from realities. A trial judge's ability, efficiency, tact or the lack of them can make all the difference regarding the fate of cases handled by him. It has to be borne in mind that the work in a court of law is not purely mechanical. The cases do not always proceed on set lines. There is no limit to the variety of new situations which can arise in human relationship in the complex society of today. No courts and no judge-made precedents can provide guidance nor can any fixed formula furnish solution in those situations. It is in such like situations for which there are no guidelines or precedents that the personal qualities and worth of a judge make themselves manifest. Errors committed by the trial judge who is not of the right calibre can sometimes be so crucial that they change the entire course of the trial and thus result in irreparable miscarriage of justice. Apart from that, a rectification of the error by the appellate court which must necessarily be after lapse of a long time, can hardly compensate for the mischief which resulted from the error committed by the trial judge.

The notion about the provisional nature of the trial court decisions being subject to correction in appeal, or what has been called the 'upper-court myth' ignores the realities of the situation. In spite of the right of appeal, there are many cases in which appeals are not filed. This apart, the appellate courts having only the written record before them, are normally reluctant to interfere with the appraisement of evidence of witnesses by the trial judges who have had the advantage of looking at the demeanour of the witnesses. The appellate court, it has been said, operates in the partial vacuum of the printed record. A stenographic transcript fails to reproduce tones of voice and hesitations of speech that often make a sentence mean the reverse of what the mere words signify. The best and most accurate record of oral testimony is like a dehydrated peach, it has neither the substance nor the flavour of the peach before it was dried.

Nowhere, it has been said, in the whole range of public office are weaknesses of character, intellect, or psychic constitution revealed more mercilessly than in the discharge of the respon-

sibilities of a trial judge. The advocates engaged by the rival parties fight tenaciously to protect the interest of their clients. No one can preside effectively over such a situation if he is mediocre in intellect or professional skill, lacking in decisiveness, or is otherwise not emotionally stable. The court-room decorum, it has been observed, has to be maintained with a firm hand if cases are to be tried fairly and expeditiously. As the case proceeds, the trial judge is called upon to make many rulings and pass interlocutory orders which are of great strategic and tactical importance for the ultimate decision of the case. These rulings have to be given and orders made under the pressure of the trial and without opportunity for elaborate arguments. The trial judge, it has been said by the American writer H.W. Jones, who is shaky in professional understanding, imperfect in moral resolution, or unduly conciliatory in personality, will inevitably be overpowered and overborne by a forceful and aggressive trial counsel. The evil that weak judges do, less often from partiality, as commonly supposed, than from simple psychic inability to stand up to abrasive or strong willed leaders of the trial bar, is a bitter but largely untold story in the administration of justice. Other shortcomings which sometimes mar the proceedings in a court of law and leave a bad taste with litigants and witnesses are the short temper, peevish nature, irascible disposition, overbearing manners and undue impatience of a trial judge. Proper and fair trial requires not only professional competence, it also needs cool temperament, mental firmness and capacity for remaining unruffled despite the provocation and the stress and strain of the trial. If, as observed by Roscoe Pound, men count more than machinery in administration of justice, it is imperative that they should be men of right calibre.

Coming to the courts of appeal, I may observe that our system contemplates one definite right of appeal, except in certain contingencies like the one where the Supreme Court itself exercises original jurisdiction or where the matter is so paltry that to provide a right of appeal would be burdening a party or tempting it to burden itself with an expense which would be wholly disproportionate to the stake involved. The system of appeal from one court to the other cannot be ordinarily avoided in any modern system. There is indeed a grave

danger and inherent risk in a system which permits of no right of appeal against the decision of the trial court. The fact that the findings of the trial court are liable to be assailed in appeal constitutes by itself a sufficient guarantee against arbitrariness both in matters of procedure to be followed by the trial court and in its approach in dealing with questions of fact or law.

The court of appeal is different for different types of cases. The form of appeal to a great extent depends upon the status of the trial court. Appeals against the decisions of the munsiff in a majority of cases lie to the subordinate judges, and in some cases to the district judge. Appeals against the decisions of the subordinate judges lie in some cases to the district judges and in others to the High Court. Appeals against the decisions of the district judges lie to the High Court. In case a single judge of the High Court decides a matter on the original side, the appeal lies to a division bench of the High Court. Appeals against the decisions of the division benches lie to the Supreme Court. On criminal side appeal against the judgment of the magistrate lies to the court of sessions, while appeals against the judgment of court of sessions lie to the High Court. When the High Court exercises original criminal jurisdiction, which is very rare, appeal against its judgement lies to the Supreme Court.

We have also provision for second appeal on a substantial question of law in civil matters in case the first appeal is decided by a court subordinate to the High Court. The object of this provision is to ensure uniformity of decision on questions of law in the same State. If the findings of the court subordinate to the High Court when deciding a first appeal were to have finality on a question of law, the inevitable effort of that would be that we shall be confronted with a situation wherein on identical questions of law the different courts in the State would be taking different views and sometimes diametrically opposite views. Such a result can plainly be not countenanced. To have uniformity of decisions on a question of law in the same State, the scheme of our judicial system is that for such questions the final court of appeal within a State would be the highest court of the State. It would also be relevant in this context to point out that a finding of fact

is of importance only to the parties to the case as it is those parties who are affected by those findings. As against that, a finding on a question of law is of importance not only to the parties to the case but also to a large number of other persons in whose cases that question of law would arise. A finding on a question of law is, therefore, of general importance and it is for that reason that it becomes imperative to ensure that the approaches to the highest courts in the State to secure authoritative pronouncements on questions of law should not be barred.

Judicial Review

One of the most important functions which has been assigned to the High Courts and the Supreme Court in India is that relating to judicial review. Part III of the constitution enumerates certain fundamental rights which have been guaranteed to all citizens. According to article 13, all laws in force in the territory of India immediately before the commencement of the constitution insofar as they are inconsistent with the provisions of part III shall to the extent of such inconsistency be void. The article further provides that the state shall not make any law which takes away or abridges the rights conferred by part III and any law made in contravention of that provision shall to the extent of the contravention be void. Our constitution thus contains an express provision that in case of a conflict between any law and the provisions relating to fundamental rights enshrined in part III of the constitution, the law to the extent of conflict shall be void. Apart from the conflict between the provisions of any law and those of part III of the constitution, occasions can also arise where there is a conflict between the provisions of a law and the provisions of the constitution, other than those contained in part III. For example, a question can also arise as to whether a law made by a State legislature relates to a subject which lies within the exclusive competence of the Central Parliament. The converse can be the position in some other cases. Who then is to decide as to whether the State legislature has transgressed into the field earmarked for the Central Parliament or whether the Central Parliament has enacted a law in respect of a matter which can only be dealt with by a State legislature ? The

scheme of our constitution is that such matters can only be decided by the High Courts and the Supreme Court. Indeed, article 141 of the constitution provides that the law declared by the Supreme Court shall be binding on all courts within the territory of India.

The doctrine of judicial review owes its origin to the case of *Marbury* v. *Madison* decided in 1803 wherein Chief Justice Marshall of the US Supreme Court dealt with the question as to what course should be adopted in case there was a conflict between the provisions of the constitution and those of the ordinary statutes. It was observed in that case that the powers of the legislature are defined and limited, and to ensure that those limits may not be mistaken, or forgotten, the constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction between a government with limited and unlimited powers is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed, are of equal obligation. It is a proposition too plain to be contested, that the constitution controls any legislative act repugnant to it; or that the legislature may alter the constitution by an ordinary act.

Between these alternatives, there is no middle ground. The constitution is either a superior paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and, like other acts, is alterable when the legislature shall please to alter it. If the former part of the alternative be true, then a legislative act, contrary to the constitution, is not law; if the latter part be true, then written constitutions are absurd attempts, on the part of the people, to limit a power, in its own nature, illimitable.

Certainly, all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently, the theory of every such government must be that an act of the legislature, repugnant to the constitution, is void. This theory is essentially attached to a written constitution, and is, consequently, to be considered as one of the fundamental principles.

Question has sometimes been raised as to whether the

courts in exercising the power of judicial review and declaring invalid and void a law made by the legislature are adopting an attitude of confrontation with the legislature. To those who express this view, the answer was given by Chief Justice Patanjali Sastry in two classic passages wherein he observed:

> This Court (the Supreme Court) is thus constituted the protector and guarantor of fundamental rights, and it cannot, consistently with the responsibilities so laid upon it, refuse to entertain applications seeking protection against the infringements of such rights.
> If, then, the Courts in this country face up to such important and none too easy task, it is not out of any desire to tilt at legislative authority in a crusader's spirit, but in discharge of a duty plainly laid upon them by the constitution. This is especially true as regards the 'fundamental rights' as to which this Court has been assigned the role of a sentinel on the *qui vive*.

While exercising the power of judicial review, the courts, to repeat what I said in *Kesavananda Bharati Case*, do not and cannot go into the question of wisdom behind a legislative measure. The policy decisions have essentially to be those of the legislatures. It is for the legislatures to decide as to what laws they should enact and bring on the statute book. The task of the courts is to interpret the laws and to adjudicate about their validity, they neither approve nor disapprove legislative policy. The office of the courts is to ascertain and declare whether the impugned legislation is in consonance with or in violation of the provisions of the constitution. Once the courts have done that, their duty ends. The courts do not act as super legislatures to suppress what they deem to be unwise legislation for if they were to do so the courts will divert criticism from the legislative door where it belongs and will thus dilute the responsibility of the elected representatives of the people. To quote further from that judgment, in exercising the power of judicial review, the courts cannot be oblivious of the practical needs of the government. The door has to be left open for trial and error. Constitutional law like other mortal contrivances has to take some chances. Opportunity must be allowed

for vindicating reasonable belief by experience. Judicial review is not intended to create what is sometimes called 'judicial oligarchy', the 'aristrocracy of the robe', 'covert legislation', or 'judge-made law'. The proper forum to fight for the wise use of the legislative authority is that of public opinion and legislative assemblies. Such contest cannot be transferred to the judicial arena. That all constitutional interpretations have political consequences should not obliterate the fact that the decision has to be arrived at in the calm and dispassionate atmosphere of the court room, that judges in order to give legitimacy to their decision, have to keep aloof from the din and controversy of politics and that the fluctuating fortunes of rival political parties can have for them only academic interest. Their primary duty is to uphold the constitution and the laws without fear or favour and, in doing so, they cannot allow any political ideology or economic theory, which may have caught their fancy, to colour the decision. The sobering reflection has always to be there that the constitution is meant not merely for people of their way of thinking but for people of fundamentally differing views.

Question sometimes is raised whether in empowering judges to exercise powers of judicial review, we are not subjecting the legislative judgment to some external restraint. To the critics who raise this question, the answer has been given that the utility of this external power has been borne out by facts of history and the experience of different nations. The great ideals of liberty and equality, it has been said, are preserved against the assaults of partisan power, the expediency of the passing hour, the erosion of small encroachments, the scorn and derision of those who have no patience of this restraining power, by enshrining them in constitutions and consecrating to the task of their protection a body of defenders. By conscious or subconscious influence, the presence of this restraining power, aloof in the background, but none the less always in reserve, tends to stabilise and rationalise the legislative judgment, to inform it with the glow of principle, to hold the standard aloft and visible to those who must run the race and keep the faith. No one can deny that there have been times when the possibility of judicial review has worked the other way. Such dangers must be balanced against the absence of all restraints on executive

or legislative wing of the state. The restraining power of judiciary does not manifest its real worth in the few cases in which the legislature has gone beyond its limits. Rather shall we find it in making vocal and audible the ideals that might otherwise be silenced and in giving them continuity of life and of expression, at times when they might be forgotten or ignored. There are occasions in the history of nations when in the heat of the moment or under the sway of passions emotions are so much aroused that our rational faculties get befogged and we are apt to take the immediate for the eternal, the transitory for the permanent and the ephemeral for the timeless. It is at such occasions that the presence and consciousness of the presence of external restraint in the form of judicial review ensures that we do not forsake the ideals enshrined in the constitution.

Friends, it is said that judges and ex-judges are, as a rule, and with few exceptions like that of the chairman of this meeting, bores. I shall therefore crave your indulgence if I have loaded this address with too much heaviness. Sometimes in the courts, and as we have today talked of the trial courts, in the trial court there takes place an incident which enlivens the proceedings. And before sitting, I shall narrate one to you.

A witness was being cross-examined and the opposite counsel, in order to shake the credit of the witness, asked the witness, "Is it a fact that you share your apartment with another woman ?" The witness replied, "Yes, it is a fact". The counsel asked, "That woman is not your wife ?". The witness replied, "No, she is not my wife". The counsel asked, "That woman is not your mother ?" The witness replied, "No, she is not my mother". The counsel asked, "She is not your sister ?" The witness said, "No, she is not my sister". The counsel said, "She is not your daughter ?" The witness replied, "No, she is not my daughter, either". At this stage, the counsel sat down saying, "I have no questions to ask." As the witness was going to depart, the judge asked, "Who is that woman ?" "She is my grandmother", replied the witness.

CONCLUDING REMARKS

M. HIDAYATULLAH

You will all agree with me that Mr. Justice Khanna has started us on an enquiry which will probably take him into more details as his lectures proceed. I have looked into his remaining lectures this afternoon and it is in the last lecture that he offers his own suggestions on the judicial system of our country to remove the shortcomings which are found in it. At this moment he has been only exploring the historical background. It has been done with great circumspection and detail. You will agree with me that he has placed a very true picture of the judicial system as it exists today and as it existed in the past. Our polity consists of three departments—the legislature, the executive and the judiciary. None of these departments is free from criticism and, although in the past, the judicial system was somewhat immune from criticism, it is now being very closely examined and criticised. There are two charges against it. One, that our judicial system is too expensive, and, two, that the system is very slow. Insofar as the first criticism is concerned, that our judicial system is expensive, it was Lord Darling who said that the doors of the law courts are open like the doors of the Ritz Hotel. Any one who can afford to pay can enter those doors. That is where we find that the judicial system now has become a sort of a commercialised thing in which everybody from the government down to the lawyer, makes a charge and sometimes an illegal charge also. The judicial system must necessarily remain expensive so long as court fees are levied and the lawyer's fees are heavy and there is a daily charge for the lawyer's attendance.

You will remember that there was a time when there was no court fee at all. The court fee was introduced in England for the first time not as payment to government but as payment to the judges. It was the judge who got the court fee, and judges competed in trying to complete cases quickly so that

their rosters would be free and they would be able to get more cases and thus more fees. Today, the judges don't get fees and the fees are pocketed by government, and the judges get their salary and they are indifferent whether they decide the case in one month, one year or ten years, so long as they can go on earning their emoluments.

That is what is the truth about the first criticism that there are charges which the litigant has to pay before he can get justice from the courts. In fact, in criminal cases, the accused has to defend himself at his own expense and then establish his innocence. It was Lord Devlin who said that it seems a ridiculous state of affairs that an innocent person has to spend his good money to establish his innocence ! So, the first charge that litigation is expensive and the judicial system is expensive can only be met if the government waives all court fees, and does not regard the judicial administration as a paying concern, and the lawyers reduce their fees.

The second charge is that the judicial system is too slow and that it takes years before you can get a decision. Now, here again, the fault is not of the courts. There is a story that one of the judges once asked a cabby in London to drive him to the courts of justice. The cabby said, "Where do they be ? I do not know them". The judge got very angry and said, "You are a cabby in London and you do not know courts of law ?" He said, "But, you said 'Courts of Justice' ". The difference is that there is no such thing as pure justice, but only there is justice according to law.

Now, how does the law come in the way of quick decision ? If you saw a *Qazi* deciding the case, he would have heard the parties in one day and given the decision pronto or immediately. But we have to decide, the judges have to decide—and I was a judge for a long time—according to law, because it is justice according to law. What does law do ? All law, in addition to creating rights and duties, does one thing, and that is to control the discretion of the judge. Therefore, the judge cannot have any discretion outside the law. If the law speaks for itself—once the discretion of the judge is taken away from him, he has no option but to carry out the law. And the legislators when they make the law are not aware of the delays that they are building in it and then they think that the judges

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Now, how does the law come in the way of quick decision ? If you saw a *Qazi* deciding the case, he would have heard the parties in one day and given the decision pronto or immediately. But we have to decide, the judges have to decide—and I was a judge for a long time—according to law, because it is justice according to law. What does law do ? All law, in addition to creating rights and duties, does one thing, and that is to control the discretion of the judge. Therefore, the judge cannot have any discretion outside the law. If the law speaks for itself—once the discretion of the judge is taken away from him, he has no option but to carry out the law. And the legislators when they make the law are not aware of the delays that they are building in it, and then they think that the judges

should short-circuit the whole thing, cut this red tape and try to do justice quickly. That is just not possible. Our judicial system, therefore, stands discredited not because the judges are slow—in fact, some of them are extremely quick—but because the law makes them slow and imposes on them the rules which have to be followed, and which cannot be short-circuited by them if they are not to be subjected to an appeal. The whole judicial system therefore needs overhaul, and I am sure Justice Khanna, with his great experience not only as a lawyer but as a very able judge, will be able to offer some solution in the end of this series of lectures. I am sure you will enjoy listening to the third lecture which is the heart of the whole thing, because the first two lectures, as he himself has admitted, are likely to be mundane and a little slow, but he gathers speed and words when he comes to the last lecture. That, I am sure, many of you would like to attend.

Let me now thank him on behalf of you and on behalf of myself for the excellent lecture he has given, and with which he starts his chain of thoughts which, we hope, will be realised further in their solution when he comes to his final lecture in the series. I have had the privilege of reading all the three lectures this afternoon, and therefore it would be no surprise to me as it may be to some of you who have come here. I will, therefore, ask you to attend his third lecture if you want to enjoy the whole series.

Thank you very much.

VOTE OF THANKS

T. N. CHATURVEDI

It is my proud privilege to express my thanks to Mr. M. Hidayatullah, the Vice-President, for taking this trouble to inaugurate the Silver Jubilee lectures. His presence here this evening has lent dignity and significance to the series of lectures by a very eminent speaker, Mr. Justice Khanna. I reserve my formal thanks to him for the concluding day.

I have a small announcement to make. There is some change in the programme. Tomorrow's lecture which will cover the topic 'Law and Its Actual Working' will be presided over by Dr. Nagendra Singh instead of Mr. Justice A. N. Grover. The third lecture which will cover the topic 'Objectives and Tasks Ahead' will be presided over by Mr. Justice A.N. Grover. The venue is the same—this auditorium—and the time is 5.30 p.m. I shall request all of you and other friends to come and attend these lectures.

Last but not the least, I have to thank the distinguished audience for responding to our invitation. I have no doubt that more and more will join us tomorrow and the day after. Mr. Justice Khanna has also agreed to answer questions on the third day, *i.e.*, at the time of the conclusion of the series, and I have no doubt that people will have many questions. There will be about fifteen minutes for asking questions and giving comments.

2ND DAY

LAW AND ITS ACTUAL WORKING

Welcome

Law and its Actual Working

Concluding Remarks

Vote of Thanks

WELCOME

T.N. CHATURVEDI

I welcome you all this evening to the second lecture of our eminent speaker, Mr. Justice H.R. Khanna, in the Silver Jubilee Lecture series of the IIPA. We are also very fortunate to have this evening Dr. Nagendra Singh to preside over the second lecture. I welcome him on your behalf, on behalf of the IIPA, and on my own.

Mr. Justice Khanna yesterday outlined the historical perspective or evolution of the judicial system. His lecture today is devoted to 'Law and Its Actual Working'.

I find it difficult to introduce Dr. Nagendra Singh in a few minutes, and in any case, the knowledgeable audience here knows much about him having read his works and having met him in different forums. But I will just venture to mention a few significant features about his extremely varied and distinguished career. He is a jurist and an expert in international law. He is an eminent administrator, having joined the ICS sometime in 1938. He is a constitutional expert, he was a member of the Constituent Assembly and, in a way, he combines in himself scholarship of different kinds. After a very distinguished career in this country—probably it is fruitless for me to go into the details—he went to Cambridge and also took his Bar-at-Law. He is an LL.D. Cambridge, D.Sc. Moscow, D.C.S. Delhi, LL.B. Dublin, D. Lit from Bihar, Doctor of Philosophy from Calcutta besides scholastic recognition from many other universities. And incidentally, all these degrees are in recognition of his scholarship and published works. He was awarded Padma Vibhushan in 1973. He has been associated with the codification of international law in different UN forums. He has also been a university professor, a visiting professor in a number of universities—Nehru Professor at Geneva University, Shri Pandeshwaram Professor at Tribhuvan University, and a number of other universities.

He is an Honorary Fellow of St. John's College, Cambridge, as you are all aware, since October 1972. Since 1972 he has been a judge at the International Court of Justice and is its Vice-President since February, 1976.

Sir, we are very grateful to you for having acceeded to our request, and this is all the more so because you are required suddenly to leave in connection with your own work late this evening, and that is why it is so very considerate of you, which shows your generosity of heart and your interest in the subject. We are indee d very thankful to have you this afternoon

LAW AND ITS ACTUAL WORKING

H. R. KHANNA

As mentioned by Mr. Chaturvedi, in my address of yesterday I dealt with the historical background and some other allied matters. Today I shall deal with 'Law and Its Actual Working'.

There are two main judicial systems in vogue in the world, the adversary system and the inquisitorial system. We in India follow the adversary system, both in civil and criminal matters. According to this system, the litigating parties have to prove their respective cases and the function of the court is to ascertain as to which of the parties is in the right. As against that, in the inquisitorial system it is the function of the judge to find out the truth. The presiding officer of the court, under this system, has necessarily to play a very active role during the trial.

It may be of interest to know some of the broad outlines of the procedure in criminal case in France which follows the inquisitorial system. According to the French Code, the offences are divided into three categories—felonies, misdemeanours and petty offences. There are three different procedures for trial of these three categories of offences. The investigation is conducted by an examining magistrate who is a part of the judiciary. The proceedings in the course of enquiry and investigation are secret. The investigation need not necessarily end in a formal charge against any one and it is open to the magistrate investigating the case to state that there is not enough evidence to justify prosecution. If, on the contrary, he comes to the conclusion that it is a fit case for trial, he passes an order for transfer of the case to the appropriate court. In case of petty offences, the case is transferred to the police court. In case of misdemeanour it is transferred for trial to an appropriate court of primary jurisdiction. Felony cases are further required to be sent to the indicting chamber of the court of

appeal. The indicting chamber has exclusive jurisdiction to order trial of felonies. The procedure followed by the indicting chamber is simple. It takes into account the report of the investigation by the magistrate, the petition of the prosecutor and the brief submitted by the civil party and the accused. Counsel can appear and argue the positions of their respective clients. If the indicting chamber takes a decision to prosecute, it passses a decree for indictment and transfers the case to the assize court for trial. One of the distinctive features of investigation in France is that the investigation being by a magistrate is much more independent.

In Italy the purpose of criminal justice is that the judgments of the court should be as nearly just as possible. In order to arrive at just decisions, the judges are not supposed to presume the innocence of the accused but to assume an attitude of impartiality at the beginning of the trial and they are allowed a greater leeway in questioning the accused and the witnesses than that granted to the Anglo-American judge or the Indian judge. In doubtful cases the Italian judges give a verdict of not proved. In the Anglo-American and the Indian system of criminal justice the motivating force is the desire to protect the accused against unmerited conviction. Fair play rather than justice according to realities is the motto. A presumption of innocence of the accused is the postulate of all criminal trials here. The judge's role is limited in direct intervention and he acts more as a referee, overseeing the game between the opposing parties and pronouncing the winner. As the state is considered to be the stronger party, it can win only if it proves the guilt of the accused beyond reasonable doubt.

In order to explain the principle which governs our courts in criminal case, I can do no better than repeat what I said in the course of a judgement. One of the cardinal principles which has always to be kept in view in our system of administration of justice for criminal cases is that a person arraigned as an accused is presumed to be innocent unless that presumption is rebutted by the prosecution by production of evidence as may show him to be guilty of the offence with which he is charged. The burden of proving the guilt of the accused is upon the prosecution and unless it relieves itself of that

burden, the courts cannot record a finding of the guilt of the accused. There are certain cases in which statutory presumptions arise regarding the guilt of the accused, but the burden even in those cases is upon the prosecution to prove the existence of facts which have to be present before the presumption can be drawn. Once those facts are shown by the prosecution to exist, the court can raise the statutory presumption and it would, in such an event, be for the accused to rebut the presumption. The onus even in such cases upon the accused is not as heavy as is normally upon the prosecution to prove the guilt of the accused. If some material is brought on the record consistent with the innocence of the accused which may reasonably be true, even though it is not positively proved to be true, the accused would be entitled to acquittal.

Onus on the Prosecution

Leaving aside the cases of statutory presumptions, the onus is upon the prosecution to prove the different ingredients of the offence and unless it discharges that onus, the prosecution cannot succeed. The court may, of course, presume, as mentioned in section 114 of the Indian Evidence Act, the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case. The illustrations mentioned in that section, though taken from different spheres of human activity, are not exhaustive. They are based upon human experience and have to be applied in the context of the facts of each case. The illustrations are merely examples of circumstances in which certain presumptions may be made. Other presumptions of a similar kind in similar circumstances can be made under the provisions of the section itself. Whether or not a presumption can be drawn under the section in a particular case depends ultimately upon the facts and circumstances of each case. No hard and fast rule can be laid down. Human behaviour is so complex that room must be left for play in the joints. It is not possible to formulate a series of exact propositions and confine human behaviour within strait jackets. The raw material here is far too complex to be susceptible of precise and exact propositions for exactness here is a fake.

Another golden thread which runs through the web of the administration of justice in criminal cases is that if two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted. This principle has a special relevance in cases where the guilt of the accused is sought to be established by circumstantial evidence. Rule has accordingly been laid down that unless the evidence adduced in the case is consistent only with the hypothesis of the guilt of the accused and is inconsistent with that of his innocence, the court should refrain from recording a finding of guilt of the accused. It is also an accepted rule that in case the court entertains reasonable doubt regarding the guilt of the accused, the accused must have the benefit of that doubt. Of course, the doubt regarding the guilt of the accused should be reasonable : it is not the doubt of a mind which is either so vacillating that it is incapable of reaching a firm conclusion or so timid that it is hesitant and afraid to take things to their natural consequences. The rule regarding the benefit of doubt also does not warrant acquittal of the accused by resort to surmises, conjectures or fanciful considerations. A criminal trial is not like a fairy tale wherein one is free to give flight to one's imagination and phantasy. It concerns itself with the question as to whether the accused arraigned at the trial is guilty of the offence with which he is charged. Crime is an event in real life and is the product of interplay of different human emotions. In arriving at the conclusion about the guilt of the accused charged with the commission of a crime, the court has to judge the evidence by the yardstick of probabilities, its intrinsic worth and the animus of witnesses. Every case in the final analysis would have to depend upon its own facts. Although the benefit of every reasonable doubt should be given to the accused, the courts should not at the same time reject evidence which is *ex facie* trustworthy on grounds which are fanciful or in the nature of conjectures.

It needs all the same to be re-emphasised that if a reasonable doubt arises regarding the guilt of the accused, the benefit of that cannot be withheld from the accused. The courts would not be justified in withholding that benefit because the acquittal

might have an impact upon the law and order situation or create adverse reaction in society or amongst those members of the society who believe the accused to be guilty. The guilt to the accused has to be adjudged not by the fact that a vast number of people believe him to be guilty but whether his guilt has been established by the evidence brought on record. Indeed, the courts have hardly any other yardstick or material to adjudge the guilt of the person arraigned as accused. Reference is sometimes made to the clash of public interest and that of the individual accused. The conflict in this respect is more apparent than real. As observed by a writer, when once it is realised, however, that the public interest is limited to the conviction, not of the guilty, but of those proved guilty, so that the function of the prosecutor is limited to securing the conviction only of those who can legitimately be proved guilty, the clash of interest is seen to operate only within a very narrow limit, namely, where the evidence is such that the guilt of the accused should be established. In the case of an accused who is innocent, or whose guilt cannot be proved, the public interest and the interest of the accused alike require an acquittal.

It is no doubt true that wrongful acquittals are undesirable and shake the confidence of the people in the judicial system; much worse, however, is the wrongful conviction of an innocent person. The consequences of the conviction of an innocent person are far more serious and its reverberations cannot but be felt in a civilized society. Suppose an innocent person is convicted of the offence of murder and is hanged, nothing further can undo the mischief for the wrong resulting from the unmerited conviction is irretrievable. To take another instance, if an innocent person is sent to jail and undergoes the sentence, the scars left by the miscarriage of justice cannot be erased by any subsequent act of expiation. Not many persons undergoing the pangs of wrongful conviction are fortunate like Dreyfus to have an Emile Zola to champion their cause and succeed in getting the verdict of guilt annulled. All this highlights the importance of ensuring, as far as possible, that there should be no wrongful conviction of an innocent person. Some risk of the conviction of the innocent, of course, is always there in any system of the administration of criminal justice. Such a risk can be minimised but not ruled out altogether.

Regarding the role of punishment of criminals, different approaches have manifested themselves. One approach is that crime is the result of psychological and social environments which urge the criminal in that direction. Punishing criminals, it is said, is analogous to locking the barn door after the horse has been stolen. Whether a criminal code exists or not, no one, according to this view, would commit a crime so long as physical and social environments do not urge him in this direction. View has further been propounded that punishment does not reform and does not alter the criminal, who is already formed, nor does it act as deterrent for others who are thrown in the way of crime by the subtle incidents of companionship, habit, judgment and opportunity. Criminal acts, according to another approach, are signals of distress and failure on the part of people who need psychiatric help. The fact that we punish rather than treat criminals is evidence of our own pathology. This school believes that society secretively wants crime, needs crime and gains definite satisfaction from the present mishandling of it. The spokesman of this view has given further expression to it in these words :

> The crime and punishment ritual is a part of our lives. We need crimes to wonder at, to enjoy vicariously, to discuss and speculate about, and to publicly deplore. We need criminals to identify ourselves with, to envy secretly, and to punish stoutly. Criminals represent our alter egos—our bad selves—rejected and projected, they do for us the forbidden, illegal things we wish to do and, like scapegoats of old, they bear the burdens of our displaced guilt and punishment... .

Another view, as pointed out by Lord Denning, emphasises the need not to construe punishment as something deterrent, reformative and preventive and nothing else. The truth, according to this view, is that some crimes are so outrageous that society insists on adequate punishment because the wrongdoers deserve it, irrespective of the fact whether it is deterrent or not. There is, however, need for a certain amount of realism in the matter of dealing with criminals. We sometime face the danger of being swept away by theories and in the process of ignoring

the hard realities of life. The major function of criminal law is to provide a social defence. In the intellectual exercise of debating the pros and cons of abstract theories about the punishment, we should not forget that basic function of criminal law or denude it of its efficacy in dealing with criminals. As has been succinctly mentioned by one writer, liberals sometime forget that victims of crimes are no less human than impoverished offenders by whom they are victimised.

One matter which has been the subject matter of considerable controversy is how far the legal system while dealing with acts of murder or rape should penalise the act as such without regard to the subjective factors in the individual offender. One extreme approach is to ignore the subjective factors in the individual offender altogether. The other extreme approach pleads for complete individualisation of the offender, *i.e.*, taking each individual as composite of moral and intellectual faculties, genetic factors and social environment. The one sphere where the conflict of these approaches has brought the controversy into sharp focus relates to offenders who are insane or mentally deficient. Persons thus afflicted, there can be no doubt, are a burden to society. Suggestion has on one side been made that the insane murderer should be punished equally with the sane or that although he ought not to be executed as a punishment he should be painlessly exterminated as a measure of social hygiene. As against the above, stress is being laid increasingly in modern times that criminal law should take into account the weaknesses of the individual as a defence against criminal prosecution or at least in mitigation of the punishment. Whatever one may say with regard to the different view points, we should not forget that criminal law cannot forsake its character of being a major and vital instrument of protection of society.

There is also sometimes a queer tilt in our values of which we must beware. On occasions the tilt manifests itself in showing undue leniency and softness to those guilty of white collared crimes because of their social background. On other occasions we find wrath and indignation rising to high pitch when dealing with economic offenders and a sudden softness enveloping as when dealing with murderers, rapists, desperadoes and burglars. Such differentiations in the treatment of

anti-social elements are necessarily lopsided.

Judicial Findings, a Quest for Truth

A question which has vexed many, both in the world of law as well as laymen, is how far the judicial findings of fact accord with the realities of the situation. Judges, of course, have to give their findings upon the evidence adduced in the case. Sometimes the witnesses do not tell the truth. On other occasions, the persons who could give the true version are not willing to come forward and give evidence as it might have the effect of antagonising one of the parties. Whatever might be the reason, the result is that a judicial finding of fact is sometimes entirely divorced from the realities of the matter. It is one thing if this incongruity between the reality and the judicial finding of fact occurs in a few cases. If, however, such incongruity becomes extensive and widespread, it is bound to shake the confidence of the people in the ability of the courts to ascertain the truth of the matter and thus to do real and substantial justice. Although it is not possible in any judicial system to prevent such incongruities in a marginal number of cases, our effort should be to ensure that our judicial system functions in such a manner that, consistently with a fair procedure, such incongruities are reduced to the minimum. There is a quest for truth in all judicial trials, an endeavour to find as to where the truth lies in the face of conflicting versions given by the opposite parties. It, therefore, becomes essential for the judicial officer to separate the grain from the chaff in order to arrive at the truth. Every judicial trial is thus a trial of our judicial system, of its capacity to find out the real facts and discover the truth, especially in the eyes of those who know the reality. Nothing brings the system into greater disrepute than a finding recorded by the court divorced from realities.

Question has been raised and which needs consideration in the above context is whether the passive role which is generally played by the judges in the adversary system, leaving it to the opposite counsels to bring on record whatever material they may consider necessary for their respective cases, should not give place to a more active role of the judges. The accusatorial system, as already mentioned, has become a part of our judicial tradition and both the members of the Bench and the

Bar have become familiar with its working. What we have to consider is whether, consistently with the above system, the courts should not play a more active role in finding the truth with a view to make their findings more in accord with the realities of the situation. For this purpose, the trial judges have to take greater interest in the proceedings before them and may have to put appropriate questions to the witnesses to elicit such information as may be helpful in finding the truth for determining the points of controversy and also for the purpose of removing obscurities on questions of fact.

One other matter may also be referred to in the above context. An impression has somehow come to prevail that no case in a court of law can succeed unless some falsehood is introduced in the evidence to be adduced in support of it. It is said that even those who are averse to telling a lie in day-to-day life have to resort to falsehood in a court of law. There may be a number of causes for this thing. One of the causes is that the law requires a particular mode of proof to establish certain facts. Sometimes the witnesses to prove that fact are not available and to comply with the legal requirement persons resort to falsehood, so as to satisfy that requirement. On other occasions, parties work under the notion that introduction of falsehood would give greater plausibility to their evidence than it would if they were to stick to strict truth. All this makes the task of the courts much more difficult. While appraising evidence, it has to be borne in mind that truth is sometime stranger than fiction and that human beings can on occasions behave in a most queer manner. At the same time, it becomes necessary to dispel the impression that falsehood pays in court and persons can resort to it with impunity. It may seem essential, whenever a clear case of falsehood becomes manifest, to take necessary action against the delinquent in accordance with the provisions of law.

Courts normally inspire awe and a visit to the court room is quite often not a pleasant experience for the parties to the case. On occasions it leaves a bad taste and a trail of bitterness because of some incident, particularly in cross-examination. Such a thing happened when Harold Laski was being cross-examined. Harold Laski had brought a libel case against Newark Advertiser for publishing an article wherein it was

said that Laski in the course of an election speech had advocated revolutionary violence. The defendant was defended by Sir Patrick Hastings, a former Attorney-General in Labour Government. During cross-examination the following transpired :

Hastings : Are there any privileged in the Labour party?
Laski : Why, indeed, Sir Patrick, when you were a member...
Judge : No, Mr. Laski.
Hastings : Do not be rude.
Laski : That is the last thing I want in the world.
Hastings : It may be difficult for you to be courteous, but do not be rude.
Laski : Not in the least.
Hastings : You are rude to everybody, are you not?
Laski : I do not think so.

The case lasted five days and, at the end, the jury found that the report in the Newark Advertiser was fair and accurate. So Laski lost the case. After the trial, Laski wrote about the fate of a witness under cross-examination and the way he was treated by the cross-examining counsel. Laski in this context observed :

> He performs his war-dance about you like a dervish intoxicated by the sheer ecstasy of his skill in his own performance, ardent in his knowledge that, if you trip for one second, his knife is at your throat....He moves between the lines of sarcasm and insult. It is an effort to tear off, piece by piece, the skin which he declares no more than a mask behind which any man of understanding could have grasped the foulness of your purpose. He treats you, not as a human being, but as a surgeon might treat some specimen he is demonstrating to students in a dissecting room.

There is sometimes a seeming conflict between the finding recorded according to law and the dictates of what we believe should be the real justice. Many of us would readily subscribe to the view that the conviction and sentence of death passed

upon Socrates was unjust. Others might come up with the answer that Socrates was tried according to the law of the land and if the law as it then was prescribed that what Socrates did was a crime and deserved death sentence, it was a sentence carried out in accordance with law. The trial of Socrates brings out questions which have been agitating mankind for the last many centuries. Some of the questions which arise from the trial, in the words of a distinguished British jurist, are : 'Was it a fair trial? Was Socrates guilty? Was the defence a long sophism? Did he corrupt the youth? Was the result a judicial error or a judicial murder?' I do not believe that to these questions there ever will be one answer. There will always be those who prize order, the interests of the community, above all else; who make the safety of the state the supreme law; and they will answer, as did Hegel, as many others have done since, 'It was a good deed', 'a necessary deed'; 'Socrates must die that the people might live and be strong.' That was the opinion of the majority of his fellow citizens; and there is no reason to believe that they repented, at all events not until long afterwards. If the prosecution and condemnation of Socrates were acts of state, they were at least done decently and in order, and with no desire to stifle the voice of the victim, and there are none of the circumstances of brutality which has been often noted in medieval and modern trials. That is one view of the trial still often expressed. But there will always be others who, prizing individual freedom and the inner life above all things, thinking much of the invisible and imponderable things about us, will regard the result as a crime, the victim as the first and greatest martyr for true freedom and true progress. In the presence of these antinomics among the irreconcilable things of life, the mere lawyer cannot give much assistance. But he will try to put himself in the position of the judges, and seek to understand the law which they administered; he will apply to their conduct the tests, not of our time, but of their own. And he will also put to himself the question : "would the results have differed if Socrates had been tried elsewhere and at some other time?"

Linked with the above question is the varying concept of justice from age to age and from country to country. Better justice is a relative term. Any attempt to give it precise defini-

tion would perhaps prove elusive, for there is something nebulous about it. What may be considered as better justice in one society may be looked upon as rank injustice in another society. Concepts of justice can also vary in the same country in different periods of history. What may be considered as a serious crime in some of the Arab countries meriting a sentence of death may hardly invite criminal prosecution in some of the western countries. Sanctity of contract at one time governed the concept of the rule of law. The concept had to undergo basic change when it was realised that in certain spheres the parties are so situated that the essential element of free bargaining is missing. Such situations arise in dealings between employer and employee, management and workmen, landlord and tenant. In such fields laws have been enacted for protection of the weaker of the two contracting parties. Those laws set right the imbalance created by the unequal position of the contracting parties. They also in certain contingencies, have an overriding effect despite the terms of the contract to the contrary. It must be added that though the concept of better justice may be imprecise at the edges, it has a core of substance which is of vital importance for the protection of human liberty and maintenance of social cohesion which law seeks to foster. Justice, it has been said, is the first virtue of social institutions as truth is of systems of thought. Laws and institutions, no matter how efficient and well arranged, must be reformed or abolished if they are unjust.

In quest for better justice we must also see that there are no features or aspects of law which create a tilt and make the scales of justice overweighted on one side. Charge has sometimes been levelled that law grinds the poor and the rich grind the law. "Laws", said Rousseau, "are always useful to those who own and injurious to those who do not....Laws gave the weak new burdens, and the strong new powers; they irretrievably destroyed natural freedom, established in perpetuity the law of property and inequality, turned a clever usurpation into an irrevocable right, and brought the whole future race under the yoke of labour, slavery and misery...All men were created free, and now they are everywhere in chains."

There is also some difference in the judicial systems of different countries regarding the number of judges to preside

over each trial court. In England, United States, India and other Commonwealth countries, the general practice is to try a case in the first instance before a single judge. As against that, the Italian tribunals and their French counterparts have three judges to sit in each trial court. The Franco-Italian preference for a plural Bench is based upon the assumption that three men are less likely to be prejudiced than one. On the other hand, the votaries of the other system feel that one man is more responsible than three. It is their contention that a single man has the moral responsibility for the decision and he cannot shirk that responsibility by putting the blame on his associates. It may be mentioned that under the system which we in India as well as other countries like Britain and United States have adopted the higher courts are quite often presided over by plurality of judges. It is, however, noteworthy that with us the dissenting opinion is part of official record. As against that, in France and Italy, dissenting opinions are not permitted and there is a fiction of unanimity in each decision.

Independence of the Court

Independence of courts is one of the most essential requisites of the rule of law. Many disputes which come up before the courts are between parties which are not evenly matched. There are disputes between the mighty and the weak, the rich and the poor, the state and the citizen. The courts have to ensure that in all these disputes the scales are held even and do not tilt on one side. If there are three indispensable requisites for the rule of law, they are an independent judiciary, a strong and vigilant Bar and an enlightened public opinion. There cannot be a worse indication of the decay in the rule of law than a subservient judiciary, a docile Bar and a society with a choked or coarsened conscience.

We all talk of the independence of the judiciary of the need to preserve it and foster it for the good of society. It is, I would say, no test of the independence of the judiciary if it shows that independence in ordinary run of cases between obscure citizens. The real test of the independence of judiciary arises in times of emergency, in atmosphere surcharged with fear and passion, in cases where important political personalities are involved and on occasions when those in power seek

to persecute under the guise of prosecution their political opponents. Law knows of no finer hour than when it cuts through formal concepts and transitory emotions to come to the rescue of oppressed and unpopular citizens. Judicial independence, it has been said, like free expression, is most crucial and most vulnerable in periods of intolerance, when the only hope of protection lies in clear rules setting forth the bright lines that cannot be traversed. The press and the judiciary are two very different institutions, but they share one significant characteristic; both contribute to our democracy not because they are responsible to any branch of government, but precisely because, except in the most extreme cases, they are not politically accountable at all and so are able to check the irresponsibility of those in power. Even in the most robust of health, the judiciary lives vulnerably. It must have 'breathing space'. We must shelter it against the dangers of a fatal chill. Speaking about the independence of judiciary, a great American said :

> As long as this buckler remains to the people, they cannot be liable to much or permanent oppression. The government may be administered with indiscretion and with violence; offices may be bestowed exclusively upon those who have no other merit than that of carrying votes at elections; the commerce of our country may be depressed by nonsensical theories, and public credit may suffer from bad intentions; but, so long as we may have an independent Judiciary, the great interests of the people will be safe.... Leave to the people an independent Judiciary, and they will prove that man is capable of governing himself; they will be saved from what has been the fate of all other Republics, and they will disprove the position that Governments of a Republican form cannot endure.

Many of us in the world of law have for long taken for granted the respect of the people. There is astir today a spirit of scepticism and, to some extent, of iconoclasm. There is also much greater awareness of rights, and people are acquiring new consciousness of the strong points and shortcomings of different human institutions. No institution can take for grant-

ed the reverence of the community. The community demands from every institution the justification of its existence, the proof of its utility. There was at one time an aura about the judicial system. It created a sense of there being something mystique about it in the minds of the people. Under the cover of that we could hide some of the shortcomings and drawbacks of the system. To some extent we in the world of law have thus thrived on the ignorance of others. Such time is now past and no more. Many of us in the world of law have so for been allergic to criticism. There is, perhaps, need today for change in our mental attitudes. If weaknesses have crept into the system, they cannot be wishfully brushed under the carpet, nor can criticism be silenced, even by threat of contempt of court. Contempt of court is no answer to genuine criticism of the functioning of our courts. Courts like all other human institutions have to earn reverence through the test of truth. If weaknesses and drawbacks have crept into the system, they have to be set right.

First of all, there is the question of the long delay in the disposal of cases which has resulted in huge arrears and heavy backlog of pending files in various courts in the country. A bare glance at the statements of various types of cases pending in different courts and the duration for which those cases have been pending is enough to show the enormity of the problem. The delay in the disposal of cases understandably causes dismay to and creates disillusionment in all those who knock at the doors of the courts. If the number of cases in the disposal of which there is delay is very large, this dismay and disillusionment would necessarily become widespread.

Long delay has also the effect of defeating justice in quite a number of cases. As a result of such delay, the possibility cannot be ruled out of loss of important evidence because of the fading of memory or death of witnesses. The consequences thus would be that a party with even a strong case may lose it not because of any fault of its own but because of the tardy judicial process entailing disappearance of material evidence. When a person knocks at the door of the court, he does so because he feels that he has a grievance and the court would grant him the necessary relief within a reasonable time. As it is, we find that cases linger on in courts for years and years, bringing

disillusionment to all those who, at one time, set high hopes in courts. The delay in the disposal of cases has affected not only the ordinary type of cases, but also those cases which, by their very nature, call for early relief. I have heard of cases where a landlord living on the second floor had a heart attack and was advised by the doctors to live on the ground floor. The landlord started proceedings for the ejectment of his tenant on the ground floor. The proceedings lingered on for years and before they could end, the landlord died. To take another case, of what avail is a decree of divorce granted in matrimonial case if the parties spend their youth in court proceedings and a decree of divorce is granted when they reach the middle age or even later. Ultimate acquittal likewise is not of much consolation to a person who has to spend years as an undertrial prisoner in jail. The problem of delay and huge arrears stares us all and unless we can do something about it the whole judicial system would get crushed under the weight of it. For long have we taken the patience of the people for granted. The need today is for some effective measures consistent with demands of justice, equity and fair play to accelerate the disposal of cases and clear the arrears.

While laying stress on the necessity of elimination of delay in the disposal of cases, we must also guard against undue speed or haste in the matter of disposal because this would be substituting one evil for another evil. Any stress on speedy disposal of cases at the cost of substantial justice would impair the faith and confidence of the people in the judicial system—perhaps in a much greater degree than would be the case if there is delay in the disposal of cases. It has to be borne in mind that in the disposal of cases certain procedural requirements which ensure fair trial and satisfy the demands of justice have to be followed. Without complying with such procedure, a trial in a court of law can hardly be said to satisfy the minimum requirements of a judicial trial; it would, in fact, be a mockery of a trial. It is not permissible to do what, it is stated, was once done by a judge. He took the bundle of the files of the cases fixed for the day and put half of the files on one side and the other half on the other. 'Reader', he said while pointing to one bundle, 'the appeals in those cases are accepted while the appeals in the other cases are dismissed.' It would

be wholly wrong to bring about speed in the disposal of court cases at the cost of substantial justice. Our object, therefore, should be to ensure that consistently with the demands of fair play and substantial justice, ways and means might be found to eliminate delays in the disposal of cases.

Provision for too many appeals has the effect of delaying the final disposal of cases. It also results in the heavy cost of litigation. All over the world today the trend is to have one right of appeal on question of fact and the right of second appeal only on substantial question of law. It is a mistake to suppose that provision for too many appeals leads to greater justice. There is no guarantee that if a decision is reversed in appeal, the decision of the court of appeal is necessarily correct and that reversed in appeal is incorrect. I have no doubt that if a right of appeal were provided from the judgment of the highest court, a number of its decisions would be reversed in appeal. The Supreme Court, it has been said, is not final because it is infallible; it is infallible because it is final.

Friends, I shall crave your indulgence if the address is loaded with too much heaviness. But I shall tell you one incident which happened in a court of law. Akbar Allahabadi, as you know, was appointed a civil judge. Once, when he was holding a court, a litigant appeared before him and said :

'Mujhe Insaaf Chhahiye Hazoor Ansar'

Akbar Allahabadi kept quiet for some time, but the man went on pestering him and repeating this thing. Akbar Allahabadi then quipped :

Mujhse Insaaf Talab Kaisi Biabani Hai,
Jis Adaalat ka main hun hakim Woh to Diwani Hai

CONCLUDING REMARKS

NAGENDAR SINGH

I consider it a great privilege to be associated with these prestigious lectures. I deliberately describe them as 'prestigious' for more reasons than one. First of all, the most learned and esteemed author of these lectures has been known in India for his outspokenness, candidness and straightforwardness. All the effort that has gone for preparing these lectures is worthwhile because the author is profound in the understanding of our judicial system. The second reason for being prestigious is that the aegis of the Institute is most appropriate for an appreciation of the judicial system of our country. The law is paramount. Its paramountcy must cover all the executive branches of the administration as well. There must be a regulatory aspect to govern every human understanding. That regulatory aspect exists in the form of administrative law also which must interest the Institute. It is clear that the ever increasing population of this country which covers a vast area could become anarchic without proper, well defined regulations and I think an appreciation of the judicial system is, therefore, necessary for the students of this Institute. Thirdly, the subject itself is one of the fundamentals of life.

The judicial system of a country is the basis of that country's civilization. Justice Khanna has displayed great erudition in his last lecture when dealing with the remedies for improving our system and in this field he will be making a contribution to the thinking on this vast subject.

I entirely agree with the very apt description which has been given to us about the judicial system as it prevails in India. It is very true that the presumption of innocence is the basis of the Commonwealth system. But it need not be described as an essentially modern trend. If we examine the ancient juristic concepts, we find that in some of the republics of India, particularly the *Lichhavies,* whom Buddha praises for their sense of justice, there were as many as eleven courts of law,

vertical not horizontal, which meant that in order to convict an accused of a criminal offence there were eleven courts that had to be satisfied. Thus if any one of them found him not guilty, he was acquitted at once. This indicates that the law in ancient India required full care to be taken so that an innocent person was never convicted.

The second aspect on which I would like to express a view is that I agree with Justice Khanna about his remarks concerning dissenting opinions. The judge should be entitled to express his dissenting opinion. However, there must be some limits to this exercise. The International Court of Justice goes a step further in the expression of dissenting opinions. First comes the judgment, then are recorded independent opinions, followed by separate opinions, and then the dissenting opinions. Sometimes these different opinions—independent, separate and dissenting—become much larger and bigger than the judgment itself. Insofar as these opinions dilute or comment on the judgment there is a feeling that this system weakens the judicial effect of a judgment. However, the International Court gives every judge the right to express his views. Some judges may be in the habit of writing almost a judgment, but a judge cannot be debarred from expressing what he thinks is right.

Lastly, there is a concern expressed by Justice Khanna on the delays that take place. This is really very important. Not only delay defeats equity, but delay defeats justice. Sometimes delay is so frustrating that the litigants who feel proud of their judiciary, because it is independent and because it is just, nevertheless feel that it is better not to have any judicial system if it takes ten years to get a judicial finding. That the individuals concerned may be dead before the court delivers judgment is most frustrating. Something has to be done to remedy this. I am sure Justice Khanna will enligthen us as to what methods can be had, without encroaching upon the basic principles of justice, to find a device to expedite the disposal of cases. We have not to sacrifice any fundamental principle yet devise proper methods by which justice can be expedited.

May I venture to make a submission in this connection. I have been watching the administrative system ever since I

joined the civil service of India in 1937. Now I do so from a distance. Whenever I go to the provinces, and recently I have visited Madhya Pradesh, I find increase in staff due to expanding activities of government in relation to an ever increasing population. For example, if there were four commissioners and one inspector general of police for a whole province, there are as many as four to five inspector-generals and several commissioners now. One has to admit that the function of government has expanded. The governmental activity today has to cover many more aspects than those covered in 1937. There has to be an expansion in the staff commensurate with the expansion of the activity in the administrative field. Whereas in the judicial field, the number of Supreme Court Judges down to sub-judges established in 1947 has continued to be the same or with very few additions. I may venture to suggest that the judiciary also needs some additional personnel, may be more courts of law or may be more judges. I have a feeling that the expansion of the judiciary in the last thirty years has not been keeping pace with the expansion of the number of cases and also compared with the expansion of the executive machinery. This is a thought which I would put before the government for their consideration.

In conclusion may I say we are all beholden to Justice Khanna for these lectures as he has given an accurate and inspiring address this evening and we are very grateful to him for being able to assist the Institute of Public Administration in throwing light on our judicial system.

VOTE OF THANKS

M.V. MATHUR

I obey the Director's 'command' to be before you to move this vote of thanks. Unfortunately, I have never been a formal student of law, but certainly, as a citizen, always subject to the laws of the land. The way the whole thing was put before us in this lecture was a sheer delight. Justice Khanna highlighted in the course of his second lecture things as they are today; he mentioned some of the felt difficulties and we now look forward to his final lecture tomorrow, which, as usually happens in the last course of a feast, is going to be most delightful.

I may highlight only two points arising out of today's lecture. Firstly, as Justice Khanna mentioned, the laws and institutions, no matter how efficient and well arranged, must be reformed or even abolished if they are unjust. In this connection who will determine as to whether these laws and institutions have become unjust? Should it be left to the courts themselves? Secondly, I may highlight the role which institutes like IIPA, or perhaps the university faculties of law could play. In USA, faculties of law or law schools play a very important role in having a critical look at key decisions of judicial courts, specially with reference to their impact on socio-economic development. I do hope that as a result of these lectures, something on those lines may get started either in IIPA itself or it may activate university faculties of law to perform this kind of a role.

To you, Mr. Chairman, we are extremely thankful because, as the Director pointed out earlier, you are due to leave New Delhi this evening for your very onerous and very important duties abroad and yet you have generously shared your time for us. As I had an occasion to mention elsewhere with reference to you, I do not know of any other person in the field of law who has got so many earned doctorates to his credit. We are really so proud of you. And you rightly mentioned to us

towards the end that the laws have got to be administered properly, and it is from this angle that the IIPA should be deeply interested. All efforts should be made to create conditions whereby the judges and judicial officers are able to dispose the cases and other matters before them in good time. I am sure these very wise points of yours will be listened to by all those who are concerned with this. So, once again, on behalf of all those present here and the IIPA I have very great pleasure in moving this vote of thanks for Dr. Nagendra Singh and Mr. Justice Khanna.

3RD DAY

OBJECTIVES AND TASKS AHEAD

Welcome
Objectives and Tasks Ahead
Questions and Answers
Concluding Remarks
Vote of Thanks

WELCOME

T.N. CHATURVEDI

On behalf of the Indian Institute of Public Administration I welcome you all to this third and final lecture in the Silver Jubilee Lectures Series—the lectures that are being delivered by Mr. Justice H.R. Khanna. As you are aware, he has already dealt with the historical background in the evolution of judicial system, and with the law as at present. And in the lecture today he is taking up the problems or the tasks of tomorrow.

We are fortunate to have Mr. Justice A.N. Grover with us this evening to preside over the third lecture. With his permission and Mr. Justice Khanna's permission I have also to inform that Mr. Justice Khanna has agreed to answer questions that might be raised from the floor. But it would be helpful if they are written out and sent in advance, or just after the lecture, so that we are also able to identify the questioners for the purpose of record of the proceedings.

As I said, we have with us Mr. Justice A.N. Grover. We all know about his very distinguished and long career as a jurist, as a judge of the Supreme Court and, prior to that, as a judge of the Punjab High Court. He has had his education in Cambridge and took his Doctoral from Middle Temple. He has been associated with a number of professional organisations showing his interest in the promotion of law and the rule of law not only in this country but all over the globe. He is on the Executive Committee of the International Law Association (Indian Chapter); he has been a member of the Executive Committee of the Indian Law Institute; is also a member currently of the World Peace Through Law Centre whose activities are devoted very much to the promotion of rule of law in all the countries of the world. We are all aware of the extraordinary circumstances in which, as a matter of principle, he resigned from his high office as a judge sometime in 1973. He is also an Honorary Scholar and Prizeman of the Christ College, Cambridge. He also headed the Commission of Inquiry

against the Chief Minister of Karnataka and his colleagues. Currently, he is the chairman of the Press Council of India. Sir, we are extremely thankful to you that you have made it convenient to spare your valuable time to preside over this concluding lecture this afternoon. On behalf of the Institute, on behalf of all the members of the audience, and on my own, I extend to you a very warm welcome.

OBJECTIVES AND TASKS AHEAD

H.R. KHANNA

In the last two lectures I dealt with the 'Historical Background' and 'Law and Its Actual Working'. The title of Today's talk is 'Objectives and Tasks Ahead.

To talk of some of the drawbacks infirmities which have manifested themselves in our judicial system is not to underestimate the importance of that system. Although every effort should be made to weed out the defects and infirmities of the system and to improve it with a view to make it responsive to the people's needs, we must guard against saying anything which might have the effect of undermining the basic and broad confidence of the people in the judiciary. It has to be borne in mind that there is vast difference between constructive and informed criticism and misleading statements and insults which are sometimes hurled. The stake of the public at large in this matter is tremendous. A respected and independent judiciary and a respected and strong bar are indispensable if we want to maintain our system of freedom under law. There is no office, it has been said, which is so infinitely powerful and, at the same time, so frightfully defenceless as that of a judge. We have also to bear in mind that human failure of a few individuals cannot be equated to the failure of the system. The contribution of the judicial system towards the evolution of an orderly society is a fact of history. Rule of law is essentially linked with the judicial system. It has accordingly been said that despite its inconsistencies, its crudities, its delays and its weaknesses, law still embodies so much of the results of that disposition as we can collectively impose. Without it we cannot live; only with it can we insure the future which, by right, is ours. The best of man's hopes are enmeshed in its success; when it fails they must fail; the measure in which it can reconcile our passions, our wills, our conflicts, is the measure of our opportunity to find ourselves.

According to Article 14 of our Constitution, the state shall not deny to any person equality before the law or the equal protection of the laws within the territory of India. It is plain that the equality enshrined in Article 14 would be unattainable unless something is done to set right the imbalance, if not fully at least in substantial measure, in any legal combat between the rich and the poor. There is also something basically wrong in a system wherein the poor and the indigent cannot obtain judicial redress of the wrongs done to them because of their poverty. It is in the above context that the system of legal aid has acquired great significance today. The system is in vogue in most of the western countries, and it is gratifying that some steps have been taken in this direction in India. At the same time, we have to ensure that the system does not encourage frivolous and vexatious litigation. The agencies in charge of legal aid thus have to ensure that not only is no person prevented from seeking judicial redress for want of funds, the provision of legal aid is also not used as a means for resort to frivolous and vexatious litigation. The legal aid under no circumstances should be used for increasing the burden of the courts with fanciful and frivolous types of cases.

Cheap Justice

One reform of the judicial system which has to be thought of is that of ensuring cheap justice. The question of cheap justice to some extent is linked with that of court fee. So far as criminal cases are concerned, the question of court fee has not much relevance as court fee is generally not required in these proceedings. The question has, however, a great significance in civil cases. In the matter of court fee we have to take into account two factors. Firstly, we have to bear in mind that justice is not a marketable commodity to secure which one should have to pay a price. Once justice is treated like a marketable commodity to be sold to the highest bidder, it ceases to be justice; it indeed becomes the antithesis of justice. Court fee in a way represents the fee which the state charges from a litigant who seeks a civil remedy from the courts. Those who are opposed to the levy of court fee might well argue that such fee actually smacks of a price which the state charges for dispensation of justice in civil matters from those who knock at

the doors of the courts. The other view, however, is that the consequences of the abolition of the court fee, apart from depriving the state of a source of revenue, would be to encourage all types of frivolous litigation and also result in suits for recovery of fanciful amounts. The protagonists of this view do not deny that despite the existing provision for court fee, many frivolous civil suits are filed in courts but they do contend that the provision about court fee still acts as a deterrent. According to them once the provision about the levy of court fee is repealed in civil suits, the number of frivolous suits would go up considerably and the amounts claimed in those suits would also run into astronomical figures.

It seems that the hard realities would compel the state not to delete the provision about levy of court fee in civil suits. Despite the retention of the provision about the levy of court fee in civil matters, there is one aspect to which particular attention may be invited. The court fee to be levied in civil matters should in no circumstances exceed the amount which the state may have to spend for the administration of civil justice. The levy of court fee should not be used as a cover for making profit. Dispensation of justice is one of the vital functions of the state and it would be extremely improper to apply a commercial approach to the same.

Law, if it is to prove an effective instrument of social utility, must respond to and find an answer to the felt necessities of the time. It cannot seek refuge in a vacuum of abstractions. Law can also prove to be a most potent means of social change. Reform, with a view to have better justice, in the sense of justice in accordance with the society's concept of fair play and equity, can be brought about in two ways—by judicial interpretation and by legislation. As regards the first aspect, it may be stated that judges by their interpretation can make laws subserve a social purpose. So far as judges of the higher courts are concerned, their office demands, as observed by me on an earlier occasion, that they be historian and prophet rolled into one, for law is not only as the past has shaped it in judgments already rendered but as the future ought to shape it in cases yet to come. Law necessarily has to carry within it the impress of the past tradition, the capacity to respond to the needs of the present and enough resilience to cope with demands of the

future. A code of law, especially in the social fields, is not a document for fastidious dialectics; properly drafted and rightly implemented it can be the means of the ordering of the life of a people. While construing such law, we have to bear in mind that the law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics. In order to know what it is, we must know what it has been, and what it tends to become. We must alternately consult history and existing theories of legislation. A great judgment, it has been said, must take deep account of day before yesterday in order that yesterday may not paralyse today and it must take account of what it decrees for today in order that today may not paralyse tomorrow. Words in statutes are not unlike words in a foreign language in that they too have 'associations, echoes and overtones.' Judges must retain the associations, hear the echoes, and capture the overtones. The law today has outgrown its primitive stage of formalism when the precise word was the sovereign talisman. To understand and construe the law, one must enter into its spirit, its setting and its history.

In France, the provisions of the Napolean Code, according to a distinguished jurist, have been adapted to modern conditions by judicial interpretation in *la sens evolutif*. We do not enquire, he said, what the legislator willed a century ago, but what he would have willed if he had known what our present conditions would be.

While dealing with and interpreting provisions of a statute, the judges sometimes come across gaps, fissures or areas of uncertainty and ambiguity. It is in such situations wherein the constitution and the statute are silent or uncertain that a judge, 'a living oracle of the law' in Blackstone's vivid phrase, gives us the judge-made law. The normal rule is that the constitution overrides a statute and a statute, if consistent with the constitution, overrides the law of judges. The judge as interpreter has to supply omissions, correct uncertainties and harmonise results with the demand of justice through a method of free decision.

Unlike some of the countries on the continent of Europe, in England, US and India precedents play a very significant

part in moulding judicial decision. This is so because ensuring continuity with the past is a matter of imperative necessity in the field of law. Back of precedents, it has been said, are the basic judicial conceptions which are the postulates of judicial reasoning, and farther back are the habits of life, the institutions of society, in which those conceptions had their origin, and which, by a process of interaction, they have modified in turn. Nonetheless, in a system so highly developed as our own, precedents have so covered the ground that they fix the point of departure from which the labour of the judge begins. Almost invariably, his first step is to examine and compare them.

No system of law can, however, be evolved by just matching shades of colours of decided cases with cases in hand. If that were all to our calling, then, in the words of Cardozo, there would be little of intellectual interest about it. The man who had the best card index of the cases would also be the wisest judge. It is when the colours do not match, when the reference in the index fail, when there is no decisive precedent, that the serious business of the judge begins. He must then fashion law for the litigants before him. In fashioning it for them, he will be fashioning it for others.

Every judgment has a generative power, a power to reproduce in its own image. Once a judgment is pronounced, it becomes a new stock of descent. It then constitutes the source from which new principles or norms may spring to shape future decisions. Nor, however, all the progeny of principles begotten of a judgment survive to maturity. Those that cannot prove their worth or withstand future scrutiny are thrown into the dustbin of judicial history. As put by Munroe Smith, in their effort to give to the social sense of justice articulate expression in rules and in principles, the method of lawfinding experts has always been experimental. The rules and principles of case law have never been treated as final truths, but as working hypotheses, continually retested in those great laboratories of the law, the courts of justice. Every new case is an experiment; and if the accepted rule which seems applicable yields a result which is felt to be unjust, the rule is reconsidered. It may not be modified at once, for the attempt to do absolute justice in every single case would make the development and maintenance of general rules impossible; but if a rule continues to

work injustice, it will eventually be reformulated. The principles themselves are continually retested; for if the rules derived from a principle do not work well, the principle itself must ultimately be re-examined.

The rendering of a judicial decision is not always an easy matter. Chief Justice Hughes once said that when we deal with questions relating to principles of law and their application, we do not suddenly rise into a stratosphere of icy certainty. It would not be difficult to decide a case if only a single principle were involved. The difficulty, however, arises when the facts of the case reveal that it is in the neighbourhood of different principles. It is then that the painful process begins through self-searching of making a choice or of accommodating two or more principles. This for any conscientious judge is the agony of his duty.

It would be presumptuous to deny the charge that in judicial history some of those who come to occupy judicial office have not been free of individual dislikes and prepossessions and there have been some others who have been carried away by their eccentricities. The real answer to the charge is that the training of the judge coupled with what is called judicial temperament will help in some degree to emancipate him from the suggestive power of individual dislikes and prepossessions. It would also help to broaden the outlook and frustrate the cramps of subconscious loyalties. It has been said that history like mathematics is obliged to assume that eccentricities more or less balance each other, so that something remains constant at the end. The same is true of the work of the courts. The eccentricities of judges balance one another.

Lest, however, there may be some misconceived notion about the infallibility of judges, it would not be out of place to narrate to you an incident in judicial history. There was once a discussion about the wording of an address which the judges had to present to the monarch. The draft contained the words 'conscious as we are of our limitations'. A number of judges took exception to those words on the ground that it would not be proper to use them about themselves as they were judges. Quietly quipped thereupon another judge who is still remembered for his brilliance, 'Supposing we substitute instead the words, conscious as we are of each other's limitations.'

Occasions sometimes arise when there is difference of opinion among the judges hearing a matter with regard to the final decision to be pronunced or with regard to the reasons in support of that decision. In the former case, there is a majority judgment and there is also a minority or dissenting judgment. In the latter case, there are concurring judgments. The lack of unanimity upon difficult legal questions should cause no surprise. The history of scholarship is a record of disagreements. And when we deal with questions relating to principles of law and their application we cannot look for physical precision or arithmetical certainty. There have been different reactions with regard to dissenting judgment and the role of the dissenting judge. One view is that, comparatively speaking at least, the dissenter is irresponsible. The spokesman of the court is cautious, fearful of the vivid word or the heightened phrase. He dreams of an unworthy brood of scions, the spawn of careless dicta, disowned by the *ratio decidendi*, to which all legitimate offspring must be able to trace their lineage. The result is to cramp and paralyse. One fears to say anything when the peril of misunderstanding puts a warning finger to the lips. Not so, however, the dissenter.... For the moment he is the gladiator making a last stand against the lions. The poor man must be forgiven a freedom of expression, tinged at rare moments, with a touch of bitterness, which magnanimity as well as caution would reject for one triumphant. To complete the picture I feel it necessary to reproduce the concluding part of my dissent in the habeas corpus case :

> I am aware of the desirability of unanimity, if possible. Unanimity obtained without sacrifice of conviction commends the decision to public confidence. Unanimity which is merely formal and which is recorded at the expense of strong conflicting views is not desirable in a court of last resort. As observed by Chief Justice Hughes, judges are not there simply to decide cases, but to decide them as they think they should be decided, and while it may be regrettable that they cannot always agree, it is better that their independence should be maintained and recognized than that unanimity should be secured through its sacrifice.

> A dissent in a court of last resort, to use his words, is an appeal to the brooding spirit of the law, to the intelligence of a future day, when a later decision may possibly correct the error into which the dissenting judge believes the court to have been betrayed.

Question is sometimes raised of the relationship between law and literature. According to some persons, a judicial opinion has no business to be literature. The idol, it is said, must be ugly, or he may be taken for a common man. The deliverance, according to this view, that has to be accepted without demur or hesitation must have a certain austerity which frowns at winning graces. Cardozo, whose pronouncements whether from the Bench or otherwise, have been scintillating and otherwise also carried the impress of literary excellence, could not subscribe to the above view. He has referred in this context to the view of others who perceived that the highest measure of condensation of short, sharp and imperative directness, a directness that speaks the voice of some external and supreme authority, is consistent, nonetheless, with supreme literary excellence. The French novelist Henri Beyle used to say that there was only one example of the perfect style and that was the Code Napoleon, for there alone everything was subordinated to the exact and complete expression of what was to be said. Henri Beyle was so much attracted by its charm that he was in the habit of reading a few paragraphs of the Code Napoleon every morning before breakfast. Although it is most imperative in legal pronouncements that precision should not be sacrificed for literary embellishment, legal pronouncements reach high water mark only when they combine within them the correctness of legal proposition with the attractiveness of literary craftsmanship. Although form is no substitute for substance, form, it is said, alone takes and holds and preserves the substance, saves it from the welter of helpless verbiage that we swim in as in a sea of tasteless tepid pudding. To give an example of the high water mark reached by the literary style in law, one may refer to the opinion of Holmes when he said :

> Persecution for the expression of opinions seems to me

perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition. To allow opposition by speech seems to indicate that you think the speech impotent, as when a man says that he has squared the circle, or that you do not care whole-heartedly for the result, or that you doubt either your power or your premises. But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas--that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment. Every year if not every day we have to wager our salvation upon some prophecy based upon imperfect knowledge. While that experiment is part of our system, I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country.

The other pronouncement to which I want to refer relates to the propensities of pigs. It was described by Sir Frederick Pollock as almost a caricature of the general idea of the reasonable man. A fence was defective and the straying pigs did mischief to a trolly car. Question which arose for decision by Baron Bramwell was as to whether the barrier should have been of sufficient strength to protect the adjoining owner against the incursions of all pigs or of pigs only of average vigour and obstinacy. "Nor do we lay down", said the learned Baron, "that there must be a fence so close and strong that no pig could push through it, or so high that no horse or bullock could leap it. One could scarcely tell the limits of such a requirement, for the strength of swine is such

that would break through almost any fence, if there were a sufficient inducement on the other side. But the company are bound to put up such a fence that a pig not of a peculiarly wandering disposition, nor under any excessive temptation, will not get through it."

Before concluding I can do no better than repeat what I said at the farewell dinner which was given to me by the Bar when I laid down my office. Like all other human institutions, the courts earn reverence through the test of truth. Years ago Harold Laski in his tribute to Justice Holmes described the hallmarks of a great judge. A great judge, he said, must be a great man. He must have a full sense of the seamless web of life, a grasp of the endless tradition from which we cannot escape. He must be capable of stern logic, and yet refuse to sacrifice to logic the hopes and fears and wants of men. He must be able to catch a glimpse of the ultimate in the immediate, of the universal in the particular. He must be statesman as well as jurist, thinker as well as lawyer. What he is doing is to shape the categories through which life must flow, and he must have a constant sense of the greatness of his task. He must know the hearts of men, and yet ask to be judged from the conscience of their minds. He must have a constant sense of essential power, and yet be capable of humility in its exercise. He must be the servant of justice and not its master, the conscience of the community and not of its dominant interests. He has to put aside the ambition which drives the politician to search for power and the thinker to the construction of abstract system. No one must be more aware of the limitations of his material, none more hesitant about his personal conviction. The great judge is perhaps the rarest of human types, for in being supremely himself he must yet be supremely selfless. He has to strive towards results he cannot control through material he has not chosen. He has to be in the great world and yet aloof from it, to observe and to examine without seeking to influence. At the same time he seeks to make the infinitely small illuminate the infinitely great. A political system which produces great judge can feel some real assurance about its future. These are stern and exacting tests but they set out an ideal and a goal, distant and remote from the reach of most of us though they may be, still for the

Another question which baffles the layman is the uncertainty of the final outcome of the court proceedings. The reason for that to a great extent is that the outcome of most judicial cases is linked with the question of fact which arises in the cases. As the finding on the question of fact depends upon the evidence adduced in the case, its sufficiency and credibility as well as the varying impression it creates upon the minds of different human beings, and judges after all are human beings, the element of uncertainty inheres in the situation and cannot be ruled out. Another factor responsible for uncertainty is that even in the pronouncements on questions of law you cannot always look for strict conformism, absolute rigidity or mathematical precision. Despite the general disposition to seek conformity and unity with past pronouncements, the note of caution must also be heeded that in our workshop of certainty, we should not fail to distinguish between the sound and genuine certainty and the certainty that is sham and outworn or between what is gold and what is tinsel. We must also ensure that the price that we pay for certainty should not be too high and exorbitant. It has to be borne in mind that there is as much danger in perpetual quiescence as there is in perpetual motion and that compromise must be found in the principle of growth. The consistency of law has to be with ultimate verities. Law has to be viewed not in shreds and patches but as something steady and whole with a sweep that reaches the horizon. We do not serve the cause of law if we preserve its certainty by spurious and unreal distinctions. By so doing we would be discrediting the idol though honouring it with lip service by going through the rubric of the ancient ritual. A true votary of law must have the courage to unmask the pretence if he wants something to abide beyond the fleeting hour. If law's uncertainties are to be corrected, so also are its deformities. The remedy that cures the one will also cure the other.

Judicial Oligarchy?

Question has sometimes been raised as to whether under the garb of rule of law are we not ushering in judicial oligarchy in place of executive supremacy. To put it in other words, if the executive supremacy results in elimination of fetters on

executive fiats, does not rule of law result in vesting the courts with immense powers of uncontrolled nature. The question thus turns on the point as to whether judges are absolutely free to decide the matters that come up before them in any way or are there any limitations subject to which the will of the judges masquerading as judicial discretion can be exercised. The answer to this was given by Justice Cardozo when he said that the judge, even though when he is free, is not wholly free. He is not to innovate at pleasure. He is not a knight errant roaming at will in pursuit of his own ideal of beauty or goodness. He is to draw inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise discretion informed by tradition, methodised by analogy, disciplined by system and subordinated to the primordial necessity of order in social life. Wide enough in all conscience is the field of discretion that remains.

But there is a limit up to which the courts can go. They have to operate within the four corners of the language of the statute. There is also a danger in a situation wherein a judge brings in his own views of socio-economic reform and allows them to colour his opinion. If an independent judiciary were to take over the role of a crusader in the struggle and strife of socio-economic changes, it will cease to be independent. The bosom of the judiciary cannot provide a solution for each and every problem, and it would not be seduced by quixotic temptation to right every fancied wrong which was paraded before it. For certain solutions we must necessarily look to the legislature. The independence of the judiciary, in the words of Learned Hand, will be lost, because the bosom of the judiciary is not ample enough for the hopes and fears of all sorts and conditions of men, nor will its answers be theirs; it must be content to stand aside from these fateful battles. There are two ways in which the judges may forfeit their independence, if they do not abstain. If they are intransigent but honest, they will be curbed; but a worse fate will befall them if they learn to trim their sails to the prevailing wind. A society whose judges have taught it to expect complaisance will exact complaisance, and complaisance under the pretence of interpretation is rottenness.

Judges, we should remember, are men, not disembodied

spirits; they respond to human emotions. The great tides and currents which engulf the rest of mankind, in the words of Cardozo, do not turn aside in their course and pass the judges idly by. Yet, notwithstanding the human factor, the courts operate in a setting that forces responsibility upon them. Judges are bound within walls, lines and limits that are often unseen by the layman—walls, lines, and limits built from the heritage of the law; the impact of the cases as they have come down through the years; the regard for precedent, the self-imposed practice of judicial restraint, in brief, the tradition of the law. It is also an essential requisite for a judge to acquire a certain amount of detachment and discernment, so that he is not carried away by popular catchwords and shibboleths. He must always beware of the danger which underlines the disposition to take the immediate for the eternal.

Law as a Tool for Social Engineering

Legislation is the major method of using law as an instrument of social engineering and for bringing about social reforms. Wisely used, the machinery of legislation can bring about a synthesis of change with continuity. It can prevent jolts in the onward march of the community and thus help in the smooth evolution of the society. In the matter of enacting statutes and making laws having impact upon the socio-economic life of the community, we should bear in mind that the law surpasses, to quote Learned Hand, the deliverances of even the most exalted of its prophets; the momentum of its composite will alone makes it effective to coerce the individual and reconcile him to subserviency. The pious tradition of law has its roots in a sound conviction of this necessity; it must be content to lag behind the best inspiration of time until it feels the weight of such general acceptance as will give sanction to its pretension to unquestioned dictation. Yet with this piety must go a task for courageous experiment, by which alone the law has been built as it has been, an indubitable structure, organic and living. Only as articulate organ of the half understood aspirations of living men, constantly recasting and adapting existing forms, bringing to the highlight of expression the dumb impulses of the present, can the men of law continue in the course of the ancestors whom they revere. While the deve-

lopment of economic and social life depends, as has been said by an Italian jurist, Giannini, on the legal institutions for which the constitutional organisation is responsible, those institutions are in turn shaped by economic and social forces, so that cyclical phenomena recur until either the legal institutions change or one of the social and economic forces undergoes a transformation, thus enabling a new cycle to start. With the change of social and economic realities, the law too undergoes a change and reflects those realities. There may be, generally there is bound to be, a lag between the social and economic reality of a society and its law. The ideal state is that in which there is the maximum approximation between the law on one side and social and economic reality on the other and the lag is as little as possible. Generally the law has been found lagging behind the march of society. Sometimes it leads and when it is in disproportionate advance it has to go back, to retrace its steps or to wait at a particular point to let social and economic reality catch up with it.

The harmony of communities, it has been aptly put by Rienhold Niebuhr, is not attained by the authority of law. The social harmony of living communities is achieved by an interaction between the normative conceptions of morality and law and the existing and developing forces and vitalities of the community. Usually the norms of law are compromises between the rational-moral ideals of what ought to be, and the possibilities of the situation as determined by given equilibria of vital forces. The specific enactments are, on the one hand, the instruments of the conscience of the community, seeking to subdue the potential anarchy of forces and interests into a tolerable harmony. They are, on the other hand, merely explicit formulations of given tensions and equilibria of life and power, as worked out by the unconscious interactions of social life.

Thoughts of great men of law are not windfalls of inspiration. They are the products of years of contemplation and brooding. It was said of a great judge that the anguish which preceded his decisions was apparent, for again and again, like Jacob, he had to wrestle with the angel all through the night; and he wrote his opinions with his very blood. But when once his mind came to rest, he was as inflexible as he had been uncertain before.

more than a century. But in a number of cases, as already mentioned, we can not help having involved language in the provisions of the statute.

Question :

For the judicial system to function effectively it has to attract persons of the requisite calibre and quality. Having regard to the general level of governmental pay scales and the high rate of earnings in the legal profession, are we attracting the right persons? If not, what changes are suggested ?

Answer :

I agree with the learned questioner that it is essential that we should attract the best persons for the Bench. I have always believed that quality counts much more than the number of judges.

So far as the other question is concerned, as to whether we should give to the judges a pay scale sufficiently attractive to induce leading members of the Bar to become judges, I would only point out one thing, that the pay scale of the judges cannot be divorced and isolated from the pay scale of the other officers. Otherwise it would create some kind of an anomaly and resentment which cannot be countenanced by any good government. At the same time, we have to ensure that the pay scales of the judges, should be sufficiently attractive to induce bright young people from the Bar to become judges. For that purpose, the Law Commission has made a suggestion to give them a higher initial start. Persons who join on the administrative side do so at a much younger age. As against that, people who join the subordinate judicial service join at a much later age because of the fact that practice for a number of years is necessary before they can be actually recruited or appointed as judicial officers. The result is that if an administrative or executive officer is appointed at the age of 24-25, a judicial officer is taken in the service at the age of about 29-30. The Law Commission has made a number of suggestions for that purpose. So far as the judges of the High Court are concerned, we

have to see that we get really competent and good persons, who have made a name in the profession. There was a time when no one when he was asked to be a judge ever declined. Now, I am given to understand—I have been told this by a number of Chief Justices of the High Courts —that leading members of the Bar are reluctant to join the Bench. For that a number of factors responsible. We will have to do some thing about the emoluments of the judges of the High Court. In this respect I may point out that before the coming into force of the constitution, the salary of a High Court Judge was Rs. 4,000. As against this, after the coming into force of the constitution, the salary of a High Court Judge is Rs. 3,500. This is so at a time when the prices of all commodities have gone up, but the salary has remained at the same level. Compared to the prices commodities before the independence era, the prices now have gone up so high that something has to be done about the salary. A number of suggestions are there for this purpose. Let us hope something is done about it. The Law Commission has made a number of suggestions to this effect.

Question :

Our procedural laws are based on the fundamental principle of natural justice. The expression by the highest court that procedural laws are handmaids of justice has led to the litigant to seek introduction of evidence when the trial is coming to an end. It is repeated and justice is delayed. Is it not that an approach is required from superior courts requiring the strict compliance of procedural rules?

Answer :

The position under the Code of Civil Procedure and the Code of Criminal Procedure is that parties have to produce evidence up to a particular stage. After that, the courts are normally reluctant to grant opportunity to the parties to produce additional evidence. Normally, the parties have to actually adhere to that. Sometimes, the interest of justice demands that even after a party has closed its evidence, it may be given further opportunity.

Discretion in such matters is to be exercised sparingly. Even a court of appeal also sometimes admits additional evidence, but then very sparingly. The parties have to adduce evidence within time and on the dates actually prescribed for the purpose.

Question :

Do you agree that there must be a separate and independent agency for appointment of judges than the present system? If so, what form of that agency do you envisage? Can independence of the judiciary be maintained without providing the basic needs to judges at the subordinate level? Do you agree with the formation of the all-India judicial service as recommended by 14th report of the Law Commission?

Answer :

About the creation of an all-India judicial service, I, when I was the chairman of the Law Commission, strongly recommended it and though the government did not make any pronouncement with regard to the other recommendations of the Law Commission, it promptly came with the reply in Parliament that the government had rejected this recommendation of the Law Commission.

About appointment of judges, the Law Commission has made some suggestions so as to eliminate the chances of executive interference in the matter of appointment of judges. We want the very best men to be appointed and for that purpose, if I may just divulge something, we have said —and I said so as on earlier occasions also when my opinion was sought in this matter—that when a recommendation is made by the Chief Justice for appointment to the Bench of the High Court then he should consult his two or three senior most colleagues and his recommendation should also incorporate the views of his two or three senior most colleagues. When all the senior judges agree with regard to the person recommended, then invariably that recommendation should be accepted. That is the one suggestion which has been made, and there are some other suggestions. But, I think, if those suggestions are actually

implemented, we shall be eliminating favouritism in the matter of appointment of judges.

Question :

Are you satisfied with the recruitment policy adopted by most States—especially South indian States—to give representation to every unrepresented community irrespective of merit? Does not that lower the quality of the judiciary? Do you share my view that the Bar—especially the senior Bar with large trial court practice—is not cooperating fully in solving the problem of delays and arrears?

Answer :

I fully subscribe to the view that we should attract the best people and that merit should not be sacrificed in order to give representation to some particular sections of population. But, at the same time, our constitution actually contemplates that some sections of the population, because of their backwardness, should not suffer from non-representation in the services. Of course, in the higher echelons of the service we need people of unquestioned merit. So far as the subordinate judiciary is concerned, provisions of the constitution have to be implemented.

Question :

During your talk, many essential and desirable attributes of a judge were mentioned. In view of that do you consider the existing system of selection of judges, specially for higher courts, needs to be changed ? With so many judges required for High Courts, who ultimately must make Chief Justices and Supreme Court Judges ? It is felt some system which can screen prospective judges needs to be evolved.

Can we not convert the present court fee into some sort of security deposit which in the event of winning a case may be returned ?

Answer :

As I have already said, some improvement in the method of the selection of judges of the higher courts is needed,

attainment of which, even though partially and not in full measure, there has to be the ceaseless striving and sustained effort.

QUESTIONS AND ANSWERS

A. N. Grover

I take it that there are only two gentlemen who wish to ask questions. But if there are more please send the slips on or you can come here and ask the question.

Question :

The court enjoys full right to check any nuisance created by any litigant or accused in the premises of the court; is it not a contempt of court? Such actions on the part of miscreants are required to be dealt with under the law to maintain the dignity and prestige of the court.

There have been occasions in Delhi and outside that demonstrations were held and slogans were raised. When the court is expected to take cognizance of such actions, the lowest to the highest judges have tolerated, which encourages the law breakers and lowers the prestige and position of the courts. May I know whether the judges are competent to preserve sanctity of the judicial system within the court precincts and to create an impression outside to check any re-occurrence?

Answer (Mr. Justice Khanna)

So far as this question is concerned, I would say that where somebody behaves in such a manner as to create a nuisance in a court of law, the courts have ample powers to take action against him, and initiate proceedings under the Contempt of Court Act. The provisions of this Act are always there at the disposal of the judge. Sometimes if you want to proceed in a summary manner, you can straightaway take action against the contaminer. There are other cases where the subordinate courts hesitate to proceed. They can report the matter to the High Court and then the High Court can take action. But I must also point out one thing: while contempt of court proceedings are

necessary in case there is an attempt to scandalise the courts or to obstruct the proceedings the courts should not give an impression of being very sensitive. The courts can also not be very touchy about some of the matters which sometimes, the litigants, in the heat of the moment and inadvertently utter in courts. In such situations, perhaps sometimes some kind of a warning to the person may prove quite effective, and judges have quite often done that.

Question :

Why has it not been possible to simplify the laws so that delays in the finalisation of cases could be avoided? What role can judiciary play in this respect?

How is it possible to decide the cases so quickly in USA and UK.? Is it not possible to adopt similar judicial procedure in India?

If legislatures are responsible for framing the complicated laws that delay cases in courts, can the judiciary take the issue to the public to simplify the laws of the land, to ensure settlement of the cases in the courts quickly?

If a judge witnesses the commitment of a crime and a case comes to his court, is it not correct and as per law for the judge to decide the case on the basis of the facts witnessed by the judge?

In the case of 'KISSA KURSI KA' can the confession of Mr. Nahata be accepted for deciding the appeal in this case?

Answer :

So far as the last question is concerned, that is a matter before the court. As it is *subjudice*, I would not like to deal with it.

So far as the question raised is about a judge being a witness of some crime : If a judge is a witness to a crime then his position becomes that of a witness, and the fact that he is a judicial officer would not prevent his becoming a witness. He would be called to appear as a witness to give the testimony. He would be disqualified to decide the case himself.

So far as the question about simplification of the proce-

dure is concerned, I would like to point out that modern society has become very complex. Laws cannot remain simple to deal with the complex problems of modern society. Soon after the revolution in Russia in 1917, they wanted very simple laws. But, with the passage of time, the system there too has become complex. Recently I read an article in the journal of the American Bar Association. According to it some of the people who have visited Russia have been told by the Russian jurists that law there is no longer simple. Even there it has become much complex.

So far as the question of delays is concerned, I would point out that delays in the disposal of cases occur in other countries like the United States and England. In fact when I was in England, Lord Salmon who came for a dinner that was given for me said that this problem of delay is before them also, but the delays that take place there are not to the extent that we face here. The same is the position in the US. In the US they are confronted with this question of an explosion of cases in courts. There are too many cases and they are trying to find solutions for them. So far they have been able to find adequate solution. The Law Commission in India has made a number of suggestions, and if I actually deal with it, I would take a very long time. With the limited time at our disposal, it may not be possible for me to dilate upon the number of suggestions made to expedite the disposal of cases.

Then the other question is : If legislatures are responsible for framing complicated laws that delay the cases in courts, can judiciary take the issue to the public.... . The judges do not resort of this kind of a thing. It is the members of the public who have to create an opinion and to bring about pressure to see that laws which are actually enacted are worded simply. But here also I must utter a note of caution. There are situations in which we cannot help having some kind of involved language in the drafting of statutes. Normally, however, it is possible to have statutes worded in simple language. I still believe that the Indian Penal Code drafted by Macaulay is one of the best pieces of draftsmanship. It is so simple and has also stood the test of time. It has been there on the statute book for

and suggestions about that have already been made. I have even referred to one of the suggestions.

About the court fee and in lieu about having some kind of security deposit, this is a matter the implications of which yet remain to be examined. I can only say that the suggestion has an element of novelty.

Question :

For preserving the rule of law, it is universally agreed, an independent judiciary is a must. Our constitution also provides for an independent judiciary. But, of late, many assaults have been made by political bosses, using the forums of legislature and executive, to do away with such independence. In this situation, what further specific institutional checks or systems would you suggest to preserve the independence of judiciary to be able to uphold the rule of law?

Answer :

Our constitution has actually provided for and contains a number of provisions which ensure the independence of the judiciary. But ultimately everyting would depend upon the way the provisions of the constitution are actually worked. If they are worked in the proper manner, I do not think there can be encroachment upon the independence of the judiciary. But if they are worked not properly but with some kind of ulterior motive then it is possible to undermine the independence of the judiciary.

I may also add that about this matter another suggestion has also been made, but I would not like to deal with that. The Law Commission has dealt with the independence of the judiciary including the independence of the High Court judges concerned.

Justice A.N. Grover :

It looks that Kissa Kursi Ka is engaging the attention of everybody. I do not blame them for this, but I am afraid that both of us are in a situation where we shall not be—at least my learned friend—will not be able to answer this question because it is *sub judice*. Any way, I will read out

this question to you and leave it to him to say what he likes, but my feeling is that he would not like to answer this question.

Question :

In Kissa Kursi Case, the issue of perjury arises and, therefore, purely from the point of view of clarifying the situation, can you throw the legal aspect of perjury in relation to affidavit once given and then putting counter-affidavit by the same person in the contextual situation ?

Answer :

The answer to this question has already been given by the learned chairman of the meeting.

Question :

You have rightly pointed out that one of the drawbacks that has crept into our judicial system is the long delay in the disposal of cases which has the effect of defeating justice in quite a number of cases. Apart from simplifying and streamlining the procedural laws, reducing the number of appeals and increasing the number of courts and judges as possible measures, not much attention seems to have been paid to the administrative aspects of the judicial system. What administrative or other measures would you recommend in order to reduce delays ?

Chairman :

It is a very important question, to my mind. But I do not know if we have the time to deal with it.

Answer :

As I said a short time ago, the Law Commission has made a number of recommendations to expedite the disposal of both civil and criminal cases. But, as has been pointed out by the learned chairman, if we actually go into that, it would at least need another lecture of about 45 minutes. I can only say a number of suggestions have been made by the Law Commission for that purpose.

Question :

There is a wide communication gap between the court and the litigant. This gap is generally filled by means of a

counsel (advocate). But an advocate, being not absolutely honest in conversation with the court, remains unable to represent the client in the true sense, because of his wish to win the case, and thus judgment is sometimes affected negatively. What may be the most proper solution which may also be practicable in such circumstances ?

Answer :

As an advocate he has a responsibility to his client. But he has also a responsibility to the court and he is to abide by the norms of court practice. Very often a litigant actually believes that a certain thing should actually be said or a certain attitude should be adopted in the conduct of that case. An advocate who is conscious of his responsibility, may think otherwise and I think we should not place any limitation or cramps on the independence of the advocate and about his approach in the matter.

Question :

Don't you think that the scenario of legal systems, which you have described, and which we have inherited mainly from the Anglo-saxon community, remains accessible and beneficial to broadly the 'haves' (privileged) of the society ?

If your answer is 'yes' to the above question, then don't you think the 'have nots' get a better deal in the Russian or Chinese type of judicial systems ?

Answer :

This is a complaint that has often been made since a long time. We have to see that this kind of imbalance that actually arises in any legal combat between the rich and the poor should be set right. A number of suggestions have already been made for that purpose.

So far as the other question is concerned, about the litigation between 'haves' and 'have nots' in China or Russia, I do not think that in those countries we have 'haves' on one side and 'have nots' on the other. Practically all are on the same economic level.

Question :

Judicial officers at the subordinate level are ill-fed, ill-

housed and ill-clad. Any immediate suggestions/reliefs? Or else, do you agree that independence becomes a farce?

Chairman :

I entirely agree with all the ills that you have suggested, but my learned brother will elucidate it more.

Answer :

I fully subscribe to the view that the way some of the judicial officers are being treated is a matter of utter disgust and shame. The Law Commission has made a number of suggestions to improve the working conditions and to provide amenities to the judicial officers. In fact, we have dealt with a number of problems which have been faced by the judicial officers. I have met judicial officers in a large number of States in the country and they have put before me their difficulties. We have, as far as possible, made concrete suggestions to bring about improvement in their actual working. I hope something will be done about it. But I won't be able to recapitulate all those suggestions.

Question :

In your illuminating lecture you have referred to the training of judges in order to free them from individual dislikes and pre-possessions. Would you kindly elaborate the point?

Answer :

All that I could say has been said in my lectures there and to elaborate would necessitate and involve giving of concrete instances, which, perhaps, may not be very desirable. The general principle I have referred to in the recent lecture.

Question :

Legislature frames laws, executive implements laws and also frames bye-laws/rules, etc. The judiciary decides, but which authority has the overseeing function for implementing the provisions of the constitution/Acts of Parliament/rules/orders? The present vigilance commission although

created in 1964 for the overseeing function is not alive to this situation/function/duty. How to correct this evil ?

Answer :

It is for the executive to implement the different provisions of law, but if in some cases the executive fails to implement some provisions of law, then a remedy is provided in the form of a *Writ of Mandamus*. You can actually force the executive by approaching the High Court. The High Court can compel the executive to perform its duty in accordance with law if the executive somehow refrains from performing the duty. It would have to comply once the *Writ of Mandamus* is actually issued. The executive can not disobey it.

Question :

The poor feels, if a case is won, it is really lost to him. If lost, he is dead.

Undertrials in Bihar have been in jail for ten years for an offence which, if proved in court, the maximum punishment is six months. Can courts play any role in such cases ?

Answer :

This question actually highlights the long delays which take place in the trial of cases. It is true that if cases remain pending for long in courts of law, the persons who win the cases in effect lose the same, and those who lose the cases are practically ruined. The remedy for that is that we must have expeditious disposal of cases.

So far as the delay in the disposal of criminal cases is concerned, in respect of under-trial prisoners, the law has made one change. If a person remains in jail during the pendency of trial, the period spent by him in jail would be taken into account when he undergoes the sentence ultimately awarded or imposed upon him. The Law Commission has also made another suggestion. In the case of bailable offences, if a person is not in a position to furnish bail for a period of one month, in that event the court would presume that he is not in a position to find a surety

because of his pecuniary circumstances. In such a case, the court would release him on his personal bond. Just to ensure that the persons released on personal bond do not misuse the concession granted to them, the Law Commission has also suggested that those who do not appear in court in spite of the fact that they have given a personal bond to the court should be proceeded against independently. For that purpose we have said that this itself should constitute a separate and distinct offence and it should be of a nonbailable nature.

Question :

What is the position of a strong Bar Association, like the American Bar Association, in the success of a judicial system ?

Answer :

A strong and independent Bar Association always helps in the proper administration of justice. India in the past has had a very strong and vigilant Bar, both during the pre-independence era and during the post-independence era. The contribution of the Bar is a fact of history. I would therefore agree with the view of the learned questioner that we should have a strong Bar.

Now, before I sit down I would just like to narrate to you one incident in a court of law. A person was put up for trial for beating his wife. When the wife and the husband appeared before the judge, the judge looked at the wife and found her to be a frail person. He then said to the accused, "How can you give beating to your wife? She is such a frail woman." The accused replied, "Sir, she always provokes me and taunts me." The judge asked, "What is the provocation? What is the taunt?" The accused said, "She always says, 'Hit me, hit me, if you dare. I am going to haul you up before that fossil of an old judge'." Case dismissed.

CONCLUDING REMARKS

A. N. GROVER

I feel greatly honoured by being here this evening and having heard such an illuminating lecture—the third one. I have gone through the first two also, and I hope you share with me our feeling of gratitude to Mr. Justice Khanna for the learning that has gone into these lectures and for the illuminating manner in which he has given an exposition of our judicial system (applause).

Now, I am deeply proud of being here because not only that he is a very esteemed colleague of mine. We both had certain things which probably some people thought were common—we both resigned on a matter of principle—we both belong to the same town, *i.e.*, the holy city of Amritsar. So we have many things in common.

I have some comments to make because I have held some very strong views on certain matters, and I will appreciate if you give a little thought to what I am going to place before you. Firstly, my approach is and has been that we in our country—probably this goes back to our old times and with our scriptures and our religious books—we believe a lot in theory and very little in practice. We set up institutions, we set up bodies to go into matters. We have set up high powered commissions which give reports, and ultimately nothing is implemented. Our recommendations even of the Law Commission or of the commissions set up to deal with the arrears—we know what the fate is. Ultimately, no implementation has been done, and from the pragmatic point of view, I say that we should develop a public opinion in this matter that we must have implementation of the reports of these commissions and not merely their appointment; otherwise the sense of appointing and spending so much money on these commissions?

Now, I will take up certain points which the learned speaker has developed in his lectures, even from the earlier ones, apart from the one he took up today, because I wish to give

you just a little idea, from the practical point of view, as to how things were even in the British times in our judicial system. I sometimes feel quite unhappy, and quite frankly, we are wedded to this system—an alien system, which has come from a country which was from different traditions, and there is no way of getting out of it. Now we are absolutely involved in it and it has become a part of our system. Let us look at the way even those people, those judges, used to administer justice. I am saying that, particularly, from the point of view of judicial independence—something on which a lot has been said, and very rightly, by Mr. Justice Khanna. But I want to give you one instance, which probably, many of you do not or will not know of how independent some of the British judges could be and particularly when it came to any interference by the executive in judicial functions. I was a student of Government College, Lahore, when this incident happened. There were two conspiracy cases which were being tried by two tribunals—one was the famous Bhagat Singh case, and there was another case of some other accused persons. Mr. Blacker, who was the sessions judge and later on became a judge of the Lahore High Court, was presiding over a tribunal consisting of himself, a public prosecutor, Mr. Jwala Prasad, and Mr. Salim, who was a very famous Barrister, he was also a tennis player; I believe some of you might have heard about him, he was also a very very well known advocate. Now, what happened was that there was some delay in some witnesses being examined, and Sir Henry Craick, the Governor, became rather impatient because they wanted a quick conviction. He wrote a letter to Mr. Blacker suggesting or saying it would be better, if the case was expedited because the matters were of such a nature, these were creating lot of agitation in the public, and so on. And, do you know what Mr. Blacker did? As sessions judge, he sent a notice of contempt to the Governor to be present on the following day and present himself for a punishment. And there you found Sir Hency Craick. And you know what the Governor was in those days—he was a real Governor and he was not like a Governor today. And there came Sir Henry Craick with all the paraphernalia—the Chief Secretary and everybody, and abject apologies were tendered, saying he was very sorry and that he unconditionally apologised. That was the majesty of

law started by the Britishers. And today I would like to see that to be done. As some one said, what happens if there is contempt committed. Well, of course, judges cannot afford to be touchy, they cannot afford to be sensitive, but at the same time, I feel that the majesty and the dignity of the court must be maintained. If any contempt is committed in court, any obstruction is created, that should not be allowed at any cost.

From the first lecture, there is another point I wish to make and that is about—a good deal that has been said about—the trial judge. Mr. Justice Khanna has also said a great deal about great judges, but to my mind even the small judges deserve lot of attention. And he has devoted lot of attention to the trial judges. I do not say they are small. They are really great. They build up the case. A trial judge, I think, is the one who is most effective in this judicial system and he is the most effective also because he builds up the case. But he is the most affected because all the ills that have been said—ill-clad, ill-paid—apply to him. Even the judges of superior courts are very poorly paid. As I will tell you presently, a trial judge is the one, who, I think, will lead to the failure of the judicial system. There was a time when the Privy Council used to accept his findings as final. They would very often say, 'we think the High Court has absolutely gone wrong in reversing the findings given by the trial judge'. But the most important thing about the trial judge is that we must look after them, the state, the government must give them reasonable living wage. If they do not have a resonable living wage, if they have to fend for everything, how on earth do you expect them to apply their mind properly to work? In order to draw the right material—I do not mean any disrespect to the judges who are there and please do not misunderstand me—but at the same time we should think of how to improve their lot. What to do about the fees of their children, how to go to the court itself—some judges, I understand, have to go by buses. That is something that we must now seriously consider and try to create a strong opinion. Every time this matter comes up, the government says, 'very sorry, if we do this with the judges, we will have to do it with others—so financial implications'. Thus the whole thing comes to an end. And if that goes on, I am afraid, the judicial

system that we have, will completely explode because unless the trial judges are of a really good calibre, unless they can apply their mind without any of these fetters without a lot of frustration around them, we will not be able to improve our judicial system nor will be able to get rid of these huge arrears. What will happen, if this thing continues, our judicial system is going to come into complete contempt in the sense that everybody feels today. What is happening? You file a suit, it goes on so long, then you go to an appeal court; that goes on for ten years, then you go to the Supreme Court; that goes on for another ten years. And probably we have not yet crossed one mark, that hundred-year mark which was crossed by a case in England. Of course, that was in the 18th century. I do not think we have reached that stage. But if we go on like this, we will certainly reach a stage where we will find that the cases are going to take so long.

When I happened to be in Singapore recently, I met one Sikh judge, Mr. Justice Chuhar Singh. He said, 'Look, I do not understand, what is happening in your country (in India)'. I said, 'What is the matter?' He said there was some niece of his who has filed a suit for dissolution of marriage. But that has gone on, and it is twelve years now. But still the divorce has not been granted or decided upon. Now I do not know what has happened. Probably that lady has either decided not to have a divorce, or she has had already some children from the other person she wanted to get married to. So this is what happens.

Now the other matter, I have already spoken about, is delay. About this I will tell you one thing, and I do not know if that has been touched upon by the learned speaker. Firstly, in criminal cases, it is the investigating agency which is very much the cause of delay. I know that when I used to visit the courts as a High Court Judge, I used to find that a case had been pending for some years simply because the prosecution witnesses, every time their turn came, the public prosecutor sent in an application saying they were not available. And the Magistrate would very conveniently and nicely go on postponing. Even in writ petitions, those of you who have had any experience of writ petitions, they are mostly all against the government. The return which is filed by the government

takes sometimes years; two years is the normal period when you can probably get a return from government. And the statutory bodies, for instance, if there is anything against a statutory body, it goes from one department to the other—all the time delay and delay keeps on occurring. So, unless everyone starts taking these matters seriously and there is cooperation with the court, we cannot eliminate this question of delay. Once we allow this matter of delay to go on as it is today, I am afraid, our judicial system cannot last. This is my honest view.

Then I must also mention, and I was a lawyer, and I still consider myself to be a member of the Bar, and it is our very good friends of the Bar who sometimes delay matters. So, unless they also appreciate that in the interest of administration of justice, no unnecessary adjournments should be asked for, and there should be complete cooperation, there should be a desire that the cases are finished expeditiously, and unless we get complete cooperation from them, I am afraid, this question of delay cannot be solved.

Some thing was said about justice being made cheap and it was very rightly observed that if you want to make justice cheap it is going to be very difficult so far as the civil cases are concerned. Criminal cases do not present any difficulty, there is no court fee to be paid. I am reminded of a case in Amritsar. There used to be about a dozen people whose profession it was to file suits. Supposing 'A' wanted to harass 'B'; then 'A' would engage so and so, and to harass 'B', will file an absolutely false and frivolous case. And the other method which was adopted later on — in one particular instance, where I found there was one individual who had a very fine way of blackmailing the people. What he would do was, he would say, 'Now you give me so much money'. When the fellow refused, he will go to ten places—file suit in Assam, in Bengal, in Bombay and you know, in all those ten places he will file suits agair : the person—all false suits—and the poor fellow had to buy him off.

And in one Amritsar suit, a person claimed that the whole of the Mall Road of Amritsar, which is worth millions and millions today, belonged to him. So that if you today remove court fee in civil cases, if you make justice cheap, I am afraid

in our country with the sense of responsibility that some of us have we will make things very difficult for the courts.

There is one thing that has been said about judicial office in the lecture. There has been a very elaborate discussion about the limitations of judges—about how they can act, and various other things. I entirely endorse that view and with utmost respect to my brother, I feel that whatever he said is absolutely correct. But at the same time I have always had a feeling as a judge and I may be wrong, probably my way of dealing and doing things was wrong, I always felt that justice must be done. It is not only that one should be looking at the technical side of law—I do not say that law should be ignored —but the technical side of law should not be completely adhered to very rigidly. And I said when I became a judge that it is the human element which should dominate one's action and thought, and I believe that a judge who is not human and who becomes a robot to my mind, that kind of a judge will not win my appro val.

There is one very interesting thing that was said by the learned Justice Khanna about the literary element in the judgments. They are most welcome. I have no quarrel with him. But what is happening now, and what has been happening for quit some time is that judges get so much swayed by the literary element or they want to show their learning to such an extent that in small matters they would write two hundred/ three hundred pages, and you do not know where you are set the end. I remember one case which came from a very well-known court—I won't name the court—on a small interlocutory matter, three judges sat and they gave three dissenting or three different opinions, and each one wrote a judgment of two hundred pages. So it came to 600 pages on a matter which could be disposed of in five minutes. And this is another cause of delay.

I do not want to name any court, but sitting in the Supreme Court, we used to find that many courts were in the habit of dictating judgments after the case was finished. That is a very good habit provided you can finish the judgment on the same day or within a reasonable time. But what has happened is you find a regular diary—on 9th December 10 pages are dictated in court, on 10th December another 10/20 pages are

dictated, and that goes on—and when there is a Division Bench, the other judge is just sitting and twiddling his thumb, and all that time is wasted of the other judge. I mean that these are the matters where the judges are very sensitive and if you tell them anything, they will be very angry. They will say, 'Why should we not do what we want to do?' I believe that there should be some uniformity in these matters and I do not know when we have seminars in every imaginable field of activity, why judges do not have any seminar, where they can have exchange of views. I once asked the Chief Justice when I was on the Bench of the Supreme Court. 'Why don't we have a regular conference of judges' ? And he said, 'Look, if we have a conference of judges, you will find that no one judge will agree with the other. So what is the use of having a conference ?'

As regards the literary style, I am all for it. But the best style that I always found was of the Privy Council. The Privy Council would express the facts and the law very concisely, briefly and with great exactitude. I think that goes up to the level of that gentleman who used to read the Code of Napoleon every morning. That may be an extreme case, but we have departed from that. Even the Supreme Court, and even I, was guilty of writing long judgments while sitting there. But I do feel that lot of time can be saved if all courts do not take so much time over judgments.

I think you have been here quite for long and you have also heard some very interesting questions. I am very happy to see that the mind of those who are not in the judiciary, even their minds, are exercised and they have taken so much interest in the judicial system. I commend very strongly that not only the learned gentlemen like you but even others, should take more interest in our judicial system and every effort should be made to persuade, to create a strong public opinion that whatever recommendations are made by the Law Commission or other commissions to improve the terms and conditions of service of the judiciary, and to improve their lot, should be implemented.

By the way, I forgot to tell you what a judge, a High Court judge, in Singapore, gets. You will be absolutely surprised. In England, of course, they get a fantastic amount, so also in

America, but even in places like Singapore they get 11,000 Singapore dollars a month which comes to Rs. 44,000 plus a free house, plus a Mercedes car which they can sell after four years and it becomes their own; every four years, it is repeated. This is the salary a High Court judge gets there. As against that here they get Rs. 3,500—which Rs. 3,500 was fixed in the year of grace 1950, when Rs. 3,500 in fact meant something equivalent to Rs. 15,000 or Rs. 20,000 today. I do not say that judges are exceptional beings. I plead and I would very strongly advocate this for the civil service also. It is not only the judges but the civil service who should be better paid and better looked after, and they should be able to get over all these difficulties which they have to face day-to-day from the financial point of view. If we want them to work hard, to give their very best, and be dedicated to the service, that is one way of doing it, and we must try hard to create a public opinion. I would rather—I have always said that—have, instead of 20 judges in one particular court, fifteen or fourteen, but pay them more and you will attract more talent.

There were many questions as to why very senior lawyers do not want to come, and so on. The only way to attract talent, not only to attract talent but to make full use of the talent when it is there, is to improve their conditions because without the judiciary, I do not see any hope for any country to remain a democracy or a republic. My learned brother has dealt with it very fully and I do not have to say anything about it. You are all aware that whenever any one is in trouble, whether he is a government servant or a private citizen or anybody, he goes to the court, he has to go to the court, and he has complete faith in the court. That is why he goes there and he expects justice from there. And in order to get justice, the only way we can do is to create a strong public opinion that the conditions of service of the civil servants and the judges must be improved.

VOTE OF THANKS

T.N. CHATURVEDI

On your behalf, on behalf of the Institute of Public Administration, and my own, I offer Mr. Justice Khanna profound thanks for the trouble he took in preparing the lectures with a view to enlighten the citizens, the common people, about the intricacies and problems of the judicial system. His lectures reflect his own personality; the perspective, and the restraint that he set are the hallmarks of a judge. Sir, we are indeed beholden to you for taking this trouble and the interest that these lectures evoked, particularly in the context of the questions that were put today, the number and variety of questions, that goes to testify the interest that the people took in these lectures and the impact that they made on the knowledgeable audience like this.

To you, sir, Mr. Justice Grover, we are very thankful not only for presiding over this evening's lecture, regulating and even sometimes disposing of some of the questions,—of course, very judiciously and very judicially—but also for the very stimulating remarks that you made and which supplement and clarify and reinforce what Mr. Justice Khanna said in the course of his three lectures.

I am also very grateful to you, ladies and gentlemen, for the interest that you have taken, the patience you have shown, the trouble you have taken in coming to attend all these lectures in the late evenings of the winter. And I have no doubt that your interest and support to the Institute and its activities will continue in the same manner in future also.

I shall also like to thank many of my colleagues at various levels who naturally have to do a lot of work in organising any function. I will let them remain unnamed, but I will like to express my appreciation and my thanks to them also. And I am also very thankful to the Press for the coverage and the support that we received from them.